

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
BRIEF**





ORIGINAL PETITION  
**75-4164**

APPEAL  
**75-6068**

B

**United States Court of Appeals**

**FOR THE SECOND CIRCUIT**

SUN ENTERPRISES, LTD., SOUTHERN NEW YORK FISH AND  
GAME ASSOCIATION, INC., LYMAN E. KIPP, RICHARD E.  
HOMAN, NO BOTTOM MARSH and BROWN BROOK,  
*Plaintiffs-Appellants,*

—against—

RUSSELL E. TRAIN, *et al.*  
[“Federal Defendants”],  
*Defendants-Appellees, and*

HERITAGE HILLS OF WESTCHESTER, *et al.*  
[“Private Defendants”],  
*Intervenors.*

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HOMAN, NO BOTTOM MARSH and BROWN BROOK,  
*Petitioners,*

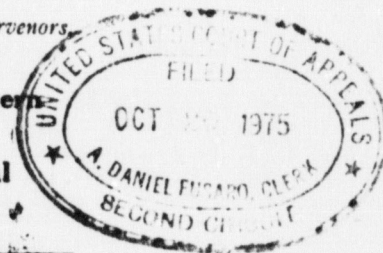
—against—

ADMINISTRATOR OF THE U. S. ENVIRONMENTAL  
PROTECTION AGENCY, RUSSELL E. TRAIN,  
*Respondent, and*

HERITAGE HILLS OF WESTCHESTER, *et al.*  
*Intervenors.*

**Appeal from the U.S. District Court for the Southern  
District of New York**

**Petition to Review Order of U.S. Environmental  
Protection Agency**



**BRIEF FOR APPELLANTS-PETITIONERS**

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Dated: New York, New York  
October 20, 1975





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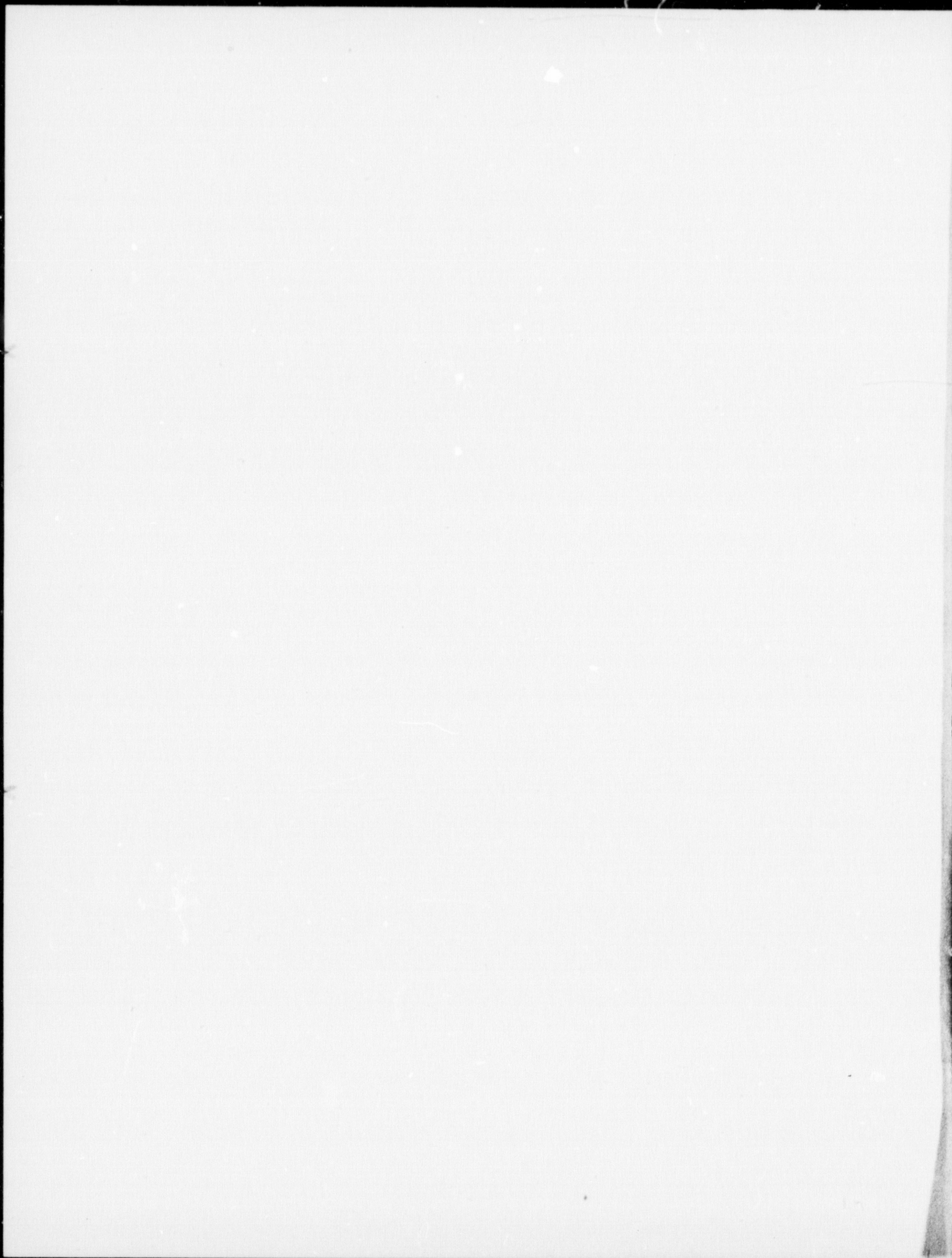
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SUN ENTERPRISES, LTD., SOUTHERN NEW YORK  
FISH AND GAME ASSOCIATION, INC., LYMAN E.  
KIPP, RICHARD E. HOMAN, NO BOTTOM MARSH  
and BROWN BROOK,

Plaintiffs-Appellants,

APPEAL

-against-

75-6068

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75-4164

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Appeal from the U.S. District Court for the Southern  
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BRIEF FOR APPELLANTS-PETITIONERS

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### PRELIMINARY STATEMENT

This is a consolidated proceeding involving the validity of a "National Pollutant Discharge Elimination System" permit, No. N.Y. 0026891 ("NPDES Permit"), granted pursuant to the Federal Water Pollution Control Act Amendments of 1972, 33 USC 1251, et seq. ("Water Act"), by the Administrator of the United States Environmental Protection Agency ("EPA"), and involving clarification of the respective jurisdictions of this Court and of the District Court to review that permit. Appellants, as plaintiffs below, appeal from the Order of the Honorable Dudley B. Bonsal, United States District Judge for the Southern District of New York, entered July 24, 1974, which Order dismissed their claims against the federal defendants for want of jurisdiction (Opinion underlying Order is at A29-A59 infra).<sup>\*</sup> As Petitioners, these same parties concurrently invoke the original jurisdiction of this Court by their Petition filed July 31, 1975, to review the aforesaid NPDES Permit.

### STATEMENT OF THE ISSUES

#### PRESENTED FOR REVIEW

1. Whether the EPA's issuance of a NPDES Permit, without affording notice to Appellants-Petitioners, without

<sup>\*</sup> Reference to copies of the record reproduced in this appendix attached to this brief are cited as "A1-A2" meaning Appendix page one through Appendix page 2.



adhering to the requirements of the EPA's wetlands regulations, and without honoring the statutorily required consultation with the Department of the Interior, violates due process of law and requires nullification of the NPDES Permit?

2. Whether the EPA's issuance of a NPDES Permit providing effluent limitations which do not protect drinking water and fish and wildlife, violates the Water Act and requires nullification of the NPDES Permit?

3. Whether the District Court erred in ruling that EPA could issue a NPDES Permit without consultation with the Department of the Interior?

4. Whether the District Court erred in ruling that it lacked jurisdiction to otherwise rule on the claims that the NPDES Permit was granted in violation of due process of law?

PRIOR PROCEEDINGS

BEFORE THIS COURT

At the Stated Term of this Court held on September 30, 1975, several motions were ruled upon. The appeal and

petition were consolidated for purposes of briefing and argument, and the printing of a separate appendix was dispensed with so that both the appeal and petition could be heard on original records. The parties agreed to provide copies of relevant documents appended to their briefs.

This Court also granted Heritage Hills of Westchester, the permittee, and the other private defendants in the proceedings below (collectively the "private defendants") leave to intervene in both the Appeal and the Petition.

Finally, motions to dismiss made by the Appellees-Respondent and by the Intervenor were denied without prejudice to renewal before the panel of this Court which will hear the appeal and petition.

#### STATEMENT OF THE CASE

Appellants-Petitioners seek revocation of the NPDES Permit here because that Permit was issued contrary to law and allows pollution of a trout stream, freshwater wetlands and underground drinking water supply. The damage now occurring because of this NPDES Permit harms each of the Appellants-Petitioners.\*

\* Full descriptions of Appellants-Petitioners appear at paragraphs 3-8 of the Amended Complaint, Document 50 on Appeal, also at paragraph 4 of the instant Petition No. 75-4164. The interests of these parties are further described in the affidavit of Lyman E. Kipp, sworn to December 20, 1975, and the affidavits of Richard E. Homan, sworn to November 11 and December 11, 1975; Documents 6 and 8 on Appeal.



A.    The Natural Resources at Stake and the  
Interests of the Appellants-Petitioners

Appellant-Petitioner Sun Enterprises, Ltd. ("Sun") owns in excess of 500 acres of land in the Town of Somers, Westchester County, New York. The property, valued at some \$12 million, contains an aquifer, a large underground drinking water supply, located beneath an extensive wetlands known as No Bottom Marsh. The aquifer is estimated to hold sufficient water to supply the daily needs of 6,000 persons each year.\* The Marsh is fed by the surrounding watershed and in particular Brown Brook, which is classified by New York State as a trout stream while it flows through Sun's property.\*\*

Lyman E. Kipp ("Kipp") is the President of Sun. He lives in Somers in the Superintendent's cottage on the Sun property. He drinks water from the aquifer and he and his family's equity is bound up in Sun's land. The availability of pure drinking water is essential to the sale and improvement of Sun's property.

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\* See affidavit of Dr. Erik Gidlund, sworn to December 26, 1975; Document 9 on Appeal.

\*\* For a complete description of the area see the testimony and the photograph and map annexed to the affidavit of Lyman E. Kipp, sworn to December 20, 1975; Document 6 on Appeal.



Richard E. Homan ("Homan") lives just behind Brown Brook. He also drinks water drawn from the aquifer. He has fished and hunted throughout the ponds of Brown Brook and No Bottom Marsh, as have many of the members of the Southern New York Fish & Game Association, Inc. ("Southern New York"). Members of Southern New York, including Homan, fished this area before Sun even acquired it. Southern New York is a not-for-profit fishing and hunting society with strong conservation and wildlife protection programs. Homan is also an officer of Southern New York.

Brown Brook and No Bottom Marsh sue here by their next best friends, Kipp, Homan, Sun and Southern New York.\*

\* The interests of all Appellants-Petitioners establish their standing. Each suffers injury in fact. Sierra Club v. Morton, 405 U.S. 727 (1972); U.S. v. SCRAP, 412 U.S. 669, 683-690 (1972). Since each of the two individuals and corporations has an interest in assuring that no pollutants enter Brown Brook and No Bottom Marsh, each is suited to represent interests of the Brook and Marsh as their next best friends. Blackwell v. Vance Trucking Co., 139 F.Supp. 103, 106 (E.D.S.C., Flor. Div., 1956). Since the EPA defaulted in protecting the Brook and the Marsh, they have no friends except the parties here. The propriety of such suit by the natural object whose rights are denied has been acknowledged. Byram River v. Village of Port Chester, -- F. Supp. --, 7 E.R.C. 1127, 4 E.L.R. 20816 (D.C. Conn., Civ. No. B-917, August 21, 1974), [Transferring venue to the Southern District of New York, where the suit is pending as 74 Civ. 4059 (WK), and the court is asked to enjoin discharge of sewage into "[t]he river, which is one of plaintiffs"]; and Hookway, et al., and The Billerica Common [a 200 year old Town Common which the Department of Transportation sought to dismember] v. D.O.T., Civ. No. 74-22425 (D.C. Mass. 1974) [the D.O.T. did not challenge the standing of the Common and subsequently dropped its plans for new roadways through the Common]. See also Christopher D. Stone, "Should Trees Have Standing? --Toward Legal Rights For Natural Objects," 45 S. CALIF. L. REV. 450 (1972).

B. The NPDES Permit Proceedings

Just north of Sun's property is a new condominium housing project known as Heritage Hills of Westchester ("HHW"). By application dated December 12, 1973, the developers of HHW applied to the EPA for a "NPDES Permit" which would license them to discharge the treated sewage from the condominium apartments into Brown Brook pursuant to §402 of the Water Act, 33 U.S.C. §1342. On the HHW site, Brown Brook is classified by New York State as an "intermittent" stream until it reaches the northern edge of No Bottom Marsh; this means that it has no flow at times during periods of dry weather. In such periods, the only flow reaching No Bottom Marsh would be sewage treatment effluent.

Prior to this application, when the HHW sewage discharge plans had first been announced, Lyman E. Kipp, the President of Sun ("Kipp") had become concerned for the safety of Sun's drinking water and for the wetlands and its fish and wildlife. He retained experts, professors at New York University and the Polytechnic Institute of New York, to do studies of the impact which any sewage treatment discharges would have on No Bottom Marsh, Brown Brook, and Sun's aquifer.

Kipp's concern arose from the HHW decision to locate its sewage treatment plant directly in the Brown



Brook stream bed and to dump the sewage treatment effluent into Brown Brook at a point just north of Sun's property.

In the Fall of 1973, Kipp attempted to present the preliminary conclusions of his experts' analysis to a hearing of the New York State Department of Environmental Conservation ("DEC"). The experts' initial conclusions were that any sewage effluent discharge at the proposed site could endanger the fish, wetlands and drinking water supply. The DEC hearing considered whether or not to allow HHW to relocate Brown Brook around the site of the sewage treatment plant. Over Kipp's objection, the DEC hearing officer on October 5, 1973, ruled that the impact of proposed sewage treatment effluent was not relevant to a stream relocation hearing.\*

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\* See Paragraphs 23-24 and Exhibit N to the Affidavit of Nicholas A. Robinson, sworn to January 7, 1975, before District Court; Document 7 on Appeal.

Counsel for Sun and Kipp in these DEC proceedings then wrote the DEC by letter dated October 31, 1973, objecting to any sewage discharge into Brown Brook. After the HHW application was filed, a second letter was sent. (A1-A2)

Under §401 of the Water Act, 33 USC 1341, the DEC is obliged to recommend or "certify" the limitations to be imposed on new effluent discharges. These limits must be strict enough to protect the quality of the receiving waters, and specifically drinking water, fish and wildlife resources. §302 of The Water Act, 33 USC 1312. The EPA must then evaluate the proposed effluent limitations and decide what limits and conditions to fix in any NPDES Permit which it issues. Accordingly, by letter of January 17, 1974, the EPA advised the DEC to make its certification (A3).

On May 15, 1974, the DEC published a notice of the fact that, HHW had filed its application for a NPDES Permit that interested parties were to contact the DEC. This notice appeared in The Reporter Dispatch, the newspaper of record designated by the Town of Somers, having general circulation in Somers.\* No mention was made of EPA procedures, and the

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\* Par. 14, Exhibit F to Document 7 on Appeal.



notice did not conform to the joint procedures for notice of pending NPDES Permit applications promulgated a week earlier (A6-A9) under authority of 40 C.F.R. §125.32(g), 38 Fed. Reg. 13536 (May 22, 1973).

Despite the letters from counsel for Kipp and Sun, neither the DEC nor the EPA replied to his offers to adduce expert evidence. Kipp himself wrote, on May 20, 1974, to the DEC (A10-A11), and again on May 28, 1974, to the EPA (A12-A13). Although his letter to the EPA was received, no reply was made to it.

Kipp wrote the EPA without consulting his New York State attorney retained to handle the DEC certification. He warned of the harm to Sun's resources and stated (A13):

"Please proceed to register this notice of protest and then take the necessary steps at your Federal Environmental [sic] level to prevent the destruction of these lands and water supply of all the downstream owners along Brown Brook from this Heritage Hills sewer plant pollutant discharge.... . We ask that you acknowledge this letter together with a statement as to the action your Federal Administration will take to prevent this proposed destruction and confiscation of a very valuable water supply."

The EPA appears to have ignored Kipp's letter entirely.

EPA's records show that it considered the Sun resources only based upon information supplied by the DEC. The EPA's inter-office memorandum (A14-A16) evaluating the effluent permit notes that Sun had warned the DEC of danger to wetlands and drinking water. In answer it quotes dicta from the decision of the DEC allowing relocation of the stream (A15); this decision was based upon the same DEC hearing in which Kipp was denied an opportunity to present all his expert evidence relevant to the adverse impact of the HHW sewage treatment to be discharged into Brown Brook. Even that dicta makes no findings as to the wetlands or aquifer, but speaks only of the stream and of the future obligation of HHW to secure the NPDES Permit (A15).

During this time, the EPA advised the Fish & Wildlife Service of the US Department of the Interior ("Interior") that the HHW application for a NPDES Permit was pending. The EPA did so to obtain the consultation with Interior required by the Fish & Wildlife Coordination Act, 16 USC 661. Interior, having noted the pendency of the HHW application since April 30, 1974,\* advised the EPA by letter dated

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\* Although proposed effluent limitations were prepared and printed for public distribution as of April 30, 1974, the printed forms were never sent to Kipp or Sun. See Exhibits D(1) and D(2) to Appeal Document 7.



May 29, 1974, that "No action, due to present lack of personnel, is contemplated on the following NPDES Applications... . NY0026891 H&H Land Corp." (A17-18).

By letter dated June 12, 1974, the DEC advised HHW of the effluent limits which the DEC had decided to certify to the EPA (A20-21). Two days earlier, without advising Kipp or Sun that certification was about to occur, the DEC had written Kipp declining to receive his expert's testimony. (A22-A23). On June 26, 1974, Kipp sent a letter of protest (A24-25), without receiving a response until August 5, 1975 (A26-A27). Even in that reply, Kipp was never told that DEC certification had occurred, or that the NPDES Permit had issued.

Meanwhile, again without any notice to Kipp, on July 12, 1974, the EPA had issued final NPDES Permit No. NY0026891 for the HHW sewage effluent discharges.\*

At this point the EPA's record is wholly devoid of any evidence that it gave the public notice of its action issuing the NPDES Permits then required under 38 Fed. Reg. 13528 (May 22, 1973). The record on the return for the Petition as

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\* The permit is Exhibit R to Appeal Document 7.

well as the EPA's affidavit of Richard G. Tisch, sworn to January 20, 1975, Document 29 on Appeal, suggests that publication occurred in The Peekskill Evening Star, but never produces a copy of that notice. None of Appellants-Petitioners have ever seen a copy.

Even if it could produce a copy, the publication would have been in the wrong newspaper. The Peekskill Evening Star has only a reported circulation of 67 issues in Somers. As the DEC was aware and the EPA should have been aware, the local newspaper designated by the Town of Somers for public notices is the White Plains Reporter Dispatch (Northern Edition) with reported circulation of 1,288 issues in Somers.\*

In short, no public notice was given. HHW made no disclosure of the fact that a NPDES Permit had issued. Despite Kipp's letter of May 28th asking to be kept advised of EPA actions (A13), the EPA ignored him.

When Kipp received the DEC's letter of August 5th (A26-A27), he was distressed that the DEC would ignore the presence of Sun's water, wetlands and fish, he actually instructed his New York counsel to commence a special proceeding in the nature of mandamus

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\* See Paragraph 47 and Exhibit E of the Affidavit of Lyman E. Kipp sworn to February 25, 1975; Document 39 on Appeal.



in the Supreme Court, Westchester County, to compel the New York State Commissioner of Environmental Conservation to hold a hearing to hear Sun's experts before certifying effluent limitations to the EPA.

This litigation began in mid-August, 1974. In or around the last week of August, the Assistant Attorney-General representing the Commissioner of the DEC advised Sun's state court trial counsel, William Florence, Esq., that since the NPDES Permit had been issued, the proceeding was moot. It was discontinued without prejudice.

In mid-September Kipp and Sun then retained Marshall, Bratter, Greene, Allison & Tucker ("Marshall, Bratter") to review the NPDES Permit and take whatever steps in federal court appeared in order to protect the water supply, wetlands, fish and wildlife of the Sun property.\*

When the DEC realized that neither it nor the EPA had ever notified Kipp and Sun that the NPDES Permit had issued, it wrote Kipp a form letter (A28). No official ever gave notice to the other Appellants-Petitioners.

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\* See affidavit of Nicholas A. Robinson, sworn to September 25, 1975, in answer to Respondents' Motion to Dismiss the Petition, No. 75-4164, in this Court.

Homan first learned about the NPDES Permit in or around late October, 1975, from Kipp. Southern New York learned subsequently when Homan, as an officer, advised its Board of Directors.

C. Efforts By Appellants-Petitioners After  
Discovering Issuance Of NPDES Permit

Once Sun and Kipp received a copy of the NPDES Permit from Marshall, Bratter on September 19, 1974, they commenced extensive expert analysis of the sufficiency of the Permit's effluent limitations to protect the drinking water, wetlands and fish. This analysis was concluded by November 23, 1974. Simultaneously, Marshall, Bratter searched the EPA and New York State DEC files to determine what had happened administratively to the requests for protection and offers of evidence from Sun and Kipp. This legal analysis was concluded after receipt in mid-November, 1974, of the hearing transcript for the DEC's Stream relocation hearing.

The scientific analysis revealed that the effluent limitations of the NPDES Permit would be insufficient to protect the wetlands and the water supply in the aquifer beneath the wetlands. Eutrophication was predicted, with subsequent destruction of the fish and the wetlands habitat



of No Bottom Marsh, and with destruction of the quality of the drinking water.\*

The legal analysis showed that at no time had any consideration been given to the fact that a wetland and drinking water supply were adjacent to the sewer pipe. No notice had been given to any of the Petitioners as required by law. No consultation had been had with the Fish and Wildlife Service of the Department of the Interior, no observance of EPA's own wetlands regulations had been made.\*\*

By December 1974, no occupants had as yet moved into the HHW condominium nor was the sewage treatment plant operational. By November, 1974, Sun's scientific and legal findings had been communicated to Homan and Southern New York. Realizing for the first time that their interests were adversely affected, they decided to join Kipp and Sun to protect the natural resources, which they used and enjoyed from destruction.

By this time, when Appellants-Petitioners were ready to press their claims in a responsible fashion, the 90-day period for judicial review of the NPDES Permit in the Court of Appeals

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\* See Affidavits of Dr. Paul Cardenas, sworn to December 2, 1975; Document 11 on Appeal; and affidavit of Dr. Guenther Stotsky, sworn to December 2, 1975; Document 9 on Appeal.

\*\* See Affidavit of Nicholas A. Robinson, sworn to January 7, 1975; Document 7 on Appeal.

under §509 of the Water Act, 33 U.S.C. 1369, had long passed. Realizing that the time was drawing near when the sewage plant would be operational, and being advised that EPA and DEC officials would not reopen the NPDES proceedings, the Appellants-Petitioners invoked their rights under due process of law and the Fish and Wildlife Coordination Act, 16 U.S.C. §661, to sue to invalidate the NPDES Permit in the U.S. District Court, S.D.N.Y. Suit was not premised on the Water Act, 33 USC 1365, although claims arising under §505 of the Water Act were added in an amended complaint filed after the requisite sixty days notice had expired.

Although the Appellants-Petitioners moved for a temporary restraining order and a preliminary injunction as soon as they had notice that the sewage treatment discharge pipe was in use,\* the District Court denied these applications.

In an opinion dated May 9, 1975, (A29-A59) the District Court dismissed the federal claims involving the NPDES Permit on the grounds that §509 of the Water Act is an "exclusive" forum for judicial review of such permits (A36). Additionally, the District Court construed the Fish & Wildlife Act, 16 U.S.C. 662(a), so as not to require consultation

\* See eg. Order to Show Cause, affidavits in support of a Preliminary Injunction and transcript of proceedings of January 20, 1975, (Documents 3, 37, 45, 47, 48, 49 and 46, on Appeal.



if Interior exercizes its "discretion" to choose not to comment. (A44-A45). EPA's failure to comply with its own wetlands regulations in issuing the NPDES Permit was not ruled upon.

Pursuant to Federal Rule of Civil Procedure 54(b), the District Court entered final judgment of dismissal dated July 23, 1975, and entered by the Clerk July 24, 1975.

The Appellants-Petitioners filed their notice of appeal on July 30, 1975, and filed the instant Petition No. 75-4164, on July 31, 1975.

#### STATUTES AND REGULATIONS INVOLVED

We respectfully refer the Court to the Legal Addendum to this brief for the relevant texts of all statutes and regulations involved.

## ARGUMENT

### I.

ISSUANCE OF THE NPDES PERMIT WITHOUT NOTICE  
AND IN VIOLATION OF EPA'S DUTIES UNDER ITS  
OWN WETLANDS REGULATIONS AND UNDER THE FISH  
AND WILDLIFE COORDINATION ACT, VIOLATES DUE  
PROCESS OF LAW.

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The Fifth Amendment of the Constitution assures that no person shall be "deprived of life, liberty, or property, without due process of law." It is elementary that the fundamental fairness assured by due process encompasses notice, the opportunity to be heard, and the governmental agency's adherence to its own rules. These guarantees were lacking here.

In the instant case, the injury from the denial of due process is plain. The EPA's callous disregard for the rights of Appellants-Petitioners has caused severe injury and threatens irreparable harm because the sewage treatment effluent allowed by the NPDES Permit already has accelerated eutrophication of the wetlands in No Bottom Marsh and degraded the surface water quality of Brown Brook. The aquifer now fills with polluted waters and unless the pollution ceases, its drinking water quality will be irreparably destroyed. Fish are dead and wildlife habitat is deteriorating.\*

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\* See Affidavit of Dr. Paul Cardenas, sworn to February 28, 1975; Document 47 on Appeal.



Such injury is taking place because the EPA issued a deficient NPDES Permit. The Permit's failings result, in material part, because EPA did not follow its own rules, and denied Appellants-Petitioners their opportunity to challenge the deficiencies.

Due process is affronted by such agency conduct:

"An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. . . [citing cases]."  
Mullane v. Central Hanover Trust Co.,  
339 U.S. 306, 314, 70 S.Ct. 652, 657  
(1950).

Here, as in Schroeder v. City of New York, 371 U.S. 208, 83 S.Ct. 279 (1962), Mullane applies. Cf. Cramer v. U.S., 353 F.Supp. 406, 408 (D. Neb. 1973).

Without notice that the NPDES Permit had issued, Kipp and Sun wasted time and money in fruitless New York State administrative and judicial proceedings before extricating the fact that federal EPA had issued the NPDES Permit. EPA refused to reopen the proceedings without the permittee's consent, and argues now with apparent equanimity both that

(i) the District Court could not hear the violation of due process because of exclusive appellate jurisdiction under §509 of the Water Act, 33 U.S.C. 1369, and (ii) that the Court of Appeals cannot hear the Petition because it was not filed within 90 days of July 12, 1974, when the NPDES Permit was issued.

The brazenness of this argument occasions its own collapse. Here are parties claiming a remedial goal, to support the legislative ends of the Water Act. Here is the agency charged with obtaining those goals barricading the door. The Constitution abhors such fundamental unfairness. "[T]he denial of a right, the foreclosing of the opportunity to the [party] to assert his claims before a designated authority or the existence of prejudice or unfairness are the marks which indicate the lack of procedural due process," U.S. v. Schultz, 150 F.Supp. 303, 305 (N.D. N.Y., 1956), affd 243 F.2d 349 (2d Cir., 1957), cert. den., 354 U.S. 921 (1957); accord, U.S. v. Fry, 203 F.2d 638 (2d Cir. 1953).

A. The Failure To Give Notice Violates Controlling Law And Denies Substantial Rights

The Water Act in §401(a), 33 U.S.C. 1341(a), requires that the DEC as the certifying state agency "shall establish



procedures for public notice." Under §402(a), 33 U.S.C. 1342(a), the EPA must afford an "opportunity for public hearing" and then exercise its discretion as to whether or not to hold a hearing.

The EPA's own regulations, then in effect, 40 C.F.R. §125.32, required the EPA to expend extra care to assure notice of NPDES applications and final Permits to "interested and potentially interested persons." Specifically, notice shall include one of the following elements:

- (i) posting in the local post office;
- (ii) posting near entrance to permittee's property;
- (iii) publication in the local newspaper of general circulation.

Additionally, notice "shall be mailed. . .to any person. . . upon request." [38 Fed. Reg. 13536 (May 22, 1973)].

The record establishes that neither the DEC nor EPA ever followed the notice procedures for draft NPDES Permits promulgated here (A6-A9). No draft NPDES Permit was ever sent to the Appellants-Petitioners. No actual or constructive notice was given, by either a posting or publication in The Reporter Dispatch as the local newspaper of general

circulation. Finally, despite the requirement of mailing notice to any person upon request, no notice was sent to Kipp or Sun despite Kipp's personal letter of May 28, 1975 (A12-A13).<sup>\*</sup> The requirement of personal notice cannot be supplanted by a careless newspaper notice, even if EPA establishes that the notice did appear in print. Miles v. District of Columbia, 354 F.Supp. 577 (D.C.D.C. 1973).

Even without the express notice provisions, "solely on due process grounds", this Court may vindicate the rights of Appellants-Petitioners to administrative fairness. Amos Treat & Co. v. SEC, 306 F.2d 260, 267 (D.C. Cir., 1962).

B. The EPA's Blind Avoidance Of Its Wetlands Regulations Raises Fundamental Denials Of Rights

No Bottom Marsh is a historic and naturally significant entity. Close to the town center of Somers, it protects the water for schools, a church, homes, the fire department, stores and the post office. Sun needs the well waters from the aquifer which No Bottom Marsh protects in order to make the balance of its property attractive for sale and improvement. Fish breed and find sustenance in the ponds among

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<sup>\*</sup> The EPA has contended this letter did not request notice of the NPDES Permit in haec verba. Such exaltation of form over substance ill serves the Government. Kipp, without consulting his attorney, invoked all his federal rights and asked for a response. Surely, this is sufficient to alert the EPA that he should receive notice.



these wetlands and their flora harbors a wide range of wildlife.

These are the very qualities set forth in 38 Fed. Reg. 10834-5 (May 2, 1973).<sup>\*</sup> They are so important that New York State just enacted a Freshwater Wetlands Act with a statement of findings substantially like that of these EPA regulations. See McKinney's Session Laws, c. 614 (August 25, 1975, No. 9).

The EPA bound itself to protect wetlands like No Bottom Marsh "to the extent of its authorities in conducting all program activities, including regulatory activities. . . ."

Kipp gave the EPA ample notice that wetlands were near the sewage effluent permit discharge point (A12-A13). The DEC also advised the EPA (A14). The EPA's response was to show absolutely no interest. By its blind indifference to its own regulations, it promulgated NPDES Permit effluent limitations which are presently at work destroying the very wetlands EPA was charged with protecting. EPA allows, contrary to the express provision of its Wetlands Resource paragraph d, "significant increase in nuisance organisms through biostimulation."

<sup>\*</sup> Also in Legal Appendum, infra, and set forth entirely as Exhibit S to Document 7 on Appeal.



Moreover, although EPA's rules require its consultation with Interior whenever wetlands are affected "to aid in the determination of the probable impact of the pollution abatement program on the pertinent fish and wildlife resources of wetlands," Policy paragraph d, this was never done here.

No Bottom Marsh is entitled to receive the protection accorded by these regulations.\* Sun and Kipp are entitled to the safeguarding of the wetlands' integrity as buffer for their aquifer's drinking water. Homan and Southern New York benefit from the wildlife aspects of the ecosystem and their rights too are diminished by EPA's disregard for its own rules.

C.    The Failure To Consult Interior Breached  
      The Fish And Wildlife Coordination Act  
      And Renders The NPDES Permit Void Ab Initio

The District Court's error in misconstruing the mandatory nature of consultation under the Fish & Wildlife Coordination Act is discussed in Point III below. Suffice it to observe here that "consultation" means more than notice from EPA to Interior that a NPDES Permit application exists and Interior's response of "no action, due to present lack of personnel. . . ." (A17)

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\*    See Professor Laurence Tribe's "Ways Not To Think About Plastic Trees: New Foundations For Environmental Law," 83 YALE L. J. 1315, 1341-3 (1974).

The Act, at 16 U.S.C. 662(a) provides that before EPA issues its NPDES Permit modifying Federal waters for any purpose whatever, EPA "first shall consult" Interior "with a view to the conservation of wildlife resources by preventing loss of and damage to such resources as well as providing for the development and improvement thereof in connection with such water-resource development."

The Coordination Act clearly governs the conditions under which this NPDES Permit may issue. 1972 U.S. CODE CONG. & ADMIN. NEWS (Vol. 2), pp. 3825-7. Since the Coordination Act was not honored, the NPDES Permit is void, and must be returned to the EPA. Udall v. F.P.C., 387 U.S. 428, 87 S.Ct. 1712 (1967).

Due process, here just as with the notice and wetlands provisions, requires EPA's compliance not only with the outward form of the law, but with its substance.



## II.

### THE NPDES PERMIT VIOLATES THE WATER ACT

The uncontroverted testimony of experts, based upon field sampling and laboratory tests,\* is that nitrogen and phosphorous in the sewage treatment effluent from the HHW discharge pipe are at levels so high as to fertilize the waters of Brown Brook and No Bottom Marsh causing eutrophication. The life in the stream and wetlands' waters is destroyed once eutrophication occurs. The trout stream becomes a drainage ditch. The aquifer, like a stopped sink, then collects the minerals, viruses, coliforms and deteriorated waters from the surface. Eventually, the pure spring water now present in the aquifer will be replaced by polluted water requiring costly treatment before used for human consumption.

The scientific evidence also reveals practical and immediate alternatives to the use of the sewage pipe at the present location.\*\*

\* Affidavits of Drs. Cardenas and Stotsky, Documents 8 and 9 on Appeal.

\*\* Affidavit of Dr. Alan Molof, sworn to December 11, 1975, Document 11 on Appeal.



The stated goal of the Water Act is "to restore and maintain the chemical, physical and biological integrity of the Nation's waters." 33 U.S.C. 1251(a). The national goal is eliminating all pollutants by 1985; the interim goal is water quality for fish propagation by 1983. §1251(a)(1) and (2).

Under §302 of the Water Act, 33 U.S.C. 1312(a), discharges of pollutants from a sewage pipe ("point source") may not "interfere with the attainment or maintenance of that water quality . . . which shall assure protection of public water supplies . . . and the protection and propagation of a balanced population of shellfish, fish and wildlife, and allow recreational activities in and on that water, effluent limitations (including alternative effluent control strategies) for such point source . . . shall be established which can reasonably be expected to contribute to the attainment or maintenance of such water quality."

In the instant case, the EPA was on notice that drinking water supplies,\* fish, wildlife and recreation assets were immediately downstream from the proposed sewage treatment effluent discharge pipe.

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\* Sun is a public water supply under the Safe Drinking Water Act of 1974, P.L. 93-523, 88 Stat. 1660, and has an independent application pending under that Act, 42 U.S.C. 1424(e) to have the aquifer classified by EPA as one in danger of contamination.

Instead of exploring the impact on these assets of the nitrogen and phosphorous levels in the HHW sewage treatment effluent, the EPA simply accepted the DEC proposed effluent limitations. Similarly, EPA's record is barren of any attempt to define "alternative effluent control strategies", although as the record illustrates that several alternatives are available here.\* See 1972 U.S. CODE CONG. & ADMIN. NEWS (Vol. 2) at 3713. Review of alternatives is not to be shirked at an administrator's whim. Cf. NRDC v. Morton, 458 F.2d 827 (D.C. Cir., 1972); EDF v. Froehlke, 473 F.2d 346 (8th Cir., 1972).

Thus, when it came to actually issuing the NPDES Permit here, the EPA had not only violated the procedural duties outlined in Point I above, but it also had failed to adhere to its substantive and mandatory duty under the Water Act. EPA could not issue a NPDES Permit under §402, 33 U.S.C. 1342, until and unless it determined that the requirements of §302, 33 U.S.C. 1312, were met.

Since the EPA was ignoring its §302 duties, it should have been ordered by the District Court to adhere to the statute. Since the instant NPDES Permit undermines rather than advances the goals of the Water Act, that Permit should be voided forthwith and the matter remanded to the EPA.

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\* Document 11 on Appeal.



### III.

EPA'S FAILURE TO CONSULT WITH INTERIOR  
VIOLATED THE MANDATORY PROCEDURES OF THE  
FISH AND WILDLIFE COORDINATION ACT, AND THE  
DISTRICT COURT ERRED IN HOLDING OTHERWISE.

The facts as to EPA's conduct under the Fish and Wildlife Coordination Act, 16 U.S.C. 662(a), below were not in dispute. (A30-A31). Accordingly, it is the legal sufficiency of those facts which is before this Court.

Can Interior take "no action, due to present lack of personnel" (A17-A18) and still comply with the Coordination Act's mandate? The mandate requires whenever a stream is modified, as by the NPDES Permit's allowance of new pollutant discharges, the EPA "first shall consult with the United States Fish and Wildlife Service, Department of the Interior . . . with a view to the conservation of wildlife resources by preventing loss of and damage to such resources . . . ." 16 U.S.C. 662(a).

A. The Plain Meaning Of The Coordination  
Act Requires Actual Consultation

Although EPA gave notice to Interior that an application for a NPDES Permit has been filed, it did not indicate in its notice that a trout stream and wetland area were involved.\* Indeed, Interior would have required the talents

\* See form of notices, Exhibits D(1) and D(2) to affidavit of Nicholas A. Robinson, sworn to January 7, 1975; Document 7 on Appeal.



of clairvoyance to realize that legitimate issues for conservation of wildlife resources were present.

Even if the EPA Permit had been valid, however, Interior apparently had already abdicated its responsibility to consult. There was not even the low-level exchange of views as occurred in E.D.F. v. Corps of Engineers, 492 F.2d 1123 (5th Cir., 1974).

The importance of strict compliance with the Fish and Wildlife Coordination Act is judicially established. The requirement of consultation is not discretionary; as the U.S. Supreme Court stated in Udall v. F.P.C., 387 U.S. 428 at 444 (1967), "Certainly the wildlife conservation aspect of the project must be explored and evaluated." (Emphasis added.)

The Court of Appeals for the Eighth Circuit in Environmental Defense Fund v. Froehlke, 473 F.2d 346 (8th Cir., 1972) distinguished the Fish and Wildlife Coordination Act from another federal law by specifically finding the duty in the Coordination Act for licensing agencies to coordinate their action with Interior so as to assure that adverse effects on fish and wildlife will be minimized.

In the most recent scholarly commentary on the Fish and Wildlife Coordination Act, Thos. Guilbert, "Wildlife

Preservation Under Federal Law" in ELI (ed.), FEDERAL ENVIRONMENTAL LAW 553 (July 1974), it is made clear that the "licensing agency is required [under 16 U.S.C. 662(b)] to give 'full consideration' to the report and recommendation of the Department of the Interior . . . ." Here there was no consideration of Interior's views by EPA because Interior declined to give them.

In Udall v. F.P.C., 387 U.S. at 443-4, the failure of the licensing agency to explore and evaluate Interior's report and recommendation resulted in remanding the matter back to the agency for further proceedings.

As a practical matter in many permit proceedings, the Fish and Wildlife Coordination Act's provisions have been deemed subsumed within the review now required under the National Environmental Policy Act, 42 U.S.C. 4321. See E.D.F. v. Froehlke, 473 F.2d 346 (8th Cir., 1972); Zabel v. Tabb, 430 F.2d 199 (5th Cir., 1970), cert. den. 401 U.S. 910 (1970). Under the Federal Water Pollution Control Act Amendments of 1972, P.L. 92-500, 86 Stat. 816, 33 U.S.C. §1251 et seq. ("Water Act") however, NEPA's full constraints were not made applicable on NPDES permits. Section 511(c) of the Water Act, 33 U.S.C. 1371.

Congress exempted NPDES permits from NEPA largely because the Water Act's whole purpose is remedial and designed



to protect the environment just as is NEPA. The remedial goal of the Water Act is to eliminate discharge of all pollutants by 1985 and as an "interim goal" to secure "water quality which provides for the protection and propagation of fish, shellfish, and wildlife . . . ." Section 101(a), 33 U.S.C. 1251. Congress was aware that its many other laws bearing directly on fish and wildlife would have to be honored whenever the Water Act permit authority was exercised, and that the very considerations which NEPA embraced could be achieved by the Water Act itself in conjunction with existing laws such as the Fish and Wildlife Coordination Act. Put simply, had Congress wanted to exempt the NPDES permits from laws other than NEPA, it would have said so.

Just as the Fish and Wildlife Coordination Act has been read in pari materia with NEPA to require a high standard of consideration of means to mitigate harm to fish and wildlife, Akers v. Resor, 339 F. Supp. 1375 (W.D. Tenn. 1972), so also this Court must read an equally high standard in construing the Coordination Act and the Water Act together. The inclusion of protection of "fish, shellfish and wildlife" in the Declaration of Policy of the Water Act reveals Congress' intent to assure the highest protection standards for such fish and wildlife. See Sen. Rep. No. 92-414, Vol. 2, 1972 U.S. CODE CONGRESSIONAL AND ADMIN. NEWS at p. 3678.\*

\* See also the same report at p. 3717 on eutrophication, p. 3719 on soil erosion, and at p. 3718 on EPA's obligation to enter into agreements with Interior with respect to implementation. No such agreement appears to have been made as to NPDES permits.

There is no other reading of the Fish and Wildlife Coordination Act that effectuates Congressional intent except adherence. The District Court erred in not so construing it below. This Court should reverse and remand to the District Court with the mandate to enjoin use of the NPDES permit as was done in an analogous situation in E.D.F. v. Corps of Engineers, 324 F. Supp. 878 (D.C., D.C. 1971), and to remand the permit back to the EPA for further proceedings pursuant to the Fish and Wildlife Coordination Act.

B. The Regulations Of EPA And Interior  
Acknowledged The Necessity Of Actual  
Consultation

Under the EPA regulations then in effect, 40 C.F.R. 125.14(f)(1), 38 Fed. Reg. 13529, at 13532 (May 22, 1973), the EPA, the EPA acknowledged its duty to ask Interior to evaluate the proposed NPDES Permit's impact on fish, shellfish, and wildlife and advise EPA of Interior's "evaluations."

EPA's regulations provide that the failure to communicate such evaluations "will be deemed to be a statement that the agencies do not choose to comment at this time."

The record here reveals not the absence of a desire to comment, but rather an inability imposed upon Interior by the Office of Budget and Management in the Executive



Office of the President. Interior acknowledges its duty to communicate evaluations and makes a record of its inability. The duties imposed by Congress are not so easily disregarded.

To suggest that it is administratively difficult to comply with the consultation requirements of the Fish and Wildlife Coordination Act is no excuse. The Circuit Court for the District of Columbia answered such bureaucratic double-talk in the analogous case of Calvert Cliffs' Coord. Comm. v. A.E.C., 449 F.2d 1109 (D.C. Cir., 1971), where the agency declined to undertake required environmental analysis because the task constituted hard work.

As was recently observed by the District of Columbia District Court in reviewing an agency's compliance with environmental laws under the Administrative Procedure Act, N.R.D.C. v. S.E.C., C.A. No. 409-73 (D.C., D.C. December 9, 1974):

"Reviewing courts have authority and responsibility to scrutinize agency decisions closely in order to ensure that they proceed from a proper understanding of the relevant laws and in order to correct those decisions which are inconsistent with Congressional mandates, fall short of the statutory policies, or strike an improper balance among conflicting interests."

See also N.L.R.B. v. Brown, 380 U.S. 278, 291-2 (1965);  
and American Ship Building Co. v. N.L.R.B., 380 U.S. 300,  
318 (1965).

As a practical consequence, plaintiffs assume that if this Court enforces the Coordination Act here, new means of compliance by Interior with the Act will be promulgated. Interior's proposed regulations, set forth at 39 Fed. Reg. 29552 (August 15, 1974), were not in effect when Interior declined to comment on the NPDES application here involved. While these proposed regulations are not now adequate to assure compliance with the Coordination Act as it relates to NPDES permits,\* they are a step in the right direction.

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\* The proposed regulations explicitly cover how the Fish and Wildlife Service will function in NPDES permit situations, §1.2A(2)(b), and §404 permits as well, §1.2B(5). Had the Service been consulted, the proposed regulations make it clear that the very kinds of wetlands, fish, migratory birds and wildlife involved in No Bottom Marsh and Brown Brook would have been considered and protected. The draft regulations expressly do not otherwise cover when Interior will review NPDES or §404 permit applications. In §1.2(2) they state the "Discharges of pollutants and the disposal of materials...will be the subject of a separate handbook...." If Interior intends to promulgate regulations declining to review NPDES permit applications, as it did here for want of personnel, then those regulations would be inconsistent with Congress' mandate in the Fish and Wildlife Coordination Act.



C. The Legislative History And Congressional Oversight Establish That Consultation is Required Under The Coordination Act.

The Coordination Act is expressly applicable to issuance of NPDES Permits under the Water Act. The Court below erred in finding that Interior's obligations were discretionary.

The Senate bill contained language which would have made the Fish and Wildlife Coordination Act inapplicable to discharge permits issued under the Water Act. S. 2770, §511(b), Leg. Hist. 1715.\* A similar provision was contained in the House bill when it emerged from Committee. H.R. 11896, §511(b), Leg. Hist. 1085.

This limiting provision was removed from the bill on the House floor by the Committee sponsoring the bill:

\* The Senate Committee on Public Works has published a detailed two-volume legislative history of the Water Act. It contains the Act, the President's veto message, excerpts from the Conference, Senate, and House Reports, and excerpts from the Senate and House debates. Senate Committees on Public Works (Library of Congress), A Legislative History of the Water Pollution Control Act Amendments of 1972, 93d Cong., 1st Sess. (Jan. 1973) (Comm. Print) (2 vols.). Citations to the Act's legislative history will be to this compilation in the form: "Leg. Hist. \_\_\_\_."

MR. WRIGHT. Mr. Chairman, this, too, is a corrective amendment which I understand has been cleared on both sides of the aisle. It would make the Fish and Wildlife Act applicable in every respect that it applies by its own terms to all sections of the bill. There was an inadvertence by which this particular section was put in the bill that renders the Fish and Wildlife Act inapplicable in certain instances. This was not the intention of the committee to do this.

MR. DINGELL. This is one of the amendments my colleagues and I were going to offer although in slightly different form. It is eminently satisfactory to us. I thank the committee and commend them for it and rise in support of it.

MR. HARSHA. Mr. Chairman, I join with the distinguished gentleman from Texas in urging the adoption of this amendment. We on this side of the aisle support it wholeheartedly. Leg. Hist. 651.

This change was adopted in the Conference Report on the bill. Leg. Hist. 331-332. The Act was passed with no provision limiting the applicability of the Fish and Wildlife Coordination Act to the Water Act.

In these circumstances, there can be no question but that the Fish and Wildlife Coordination Act is fully applicable to the Water Act and that Congress fully intended that the Coordination Act apply.

The arguments by EPA and Interior before the District Court essentially were that the consultation required by



the Coordination Act is discretionary, and that full compliance in all instances is impractical. In support of their position, they cited testimony of an Assistant Secretary of the Interior and the draft regulations which Interior has proposed for the implementation of the Act.

However, neither the testimony of the Assistant Secretary nor the proposed regulations even purports to state that the Coordination Act is discretionary. Both provide only that there are degrees of thoroughness with which proposed permits will be reviewed. For example, Assistant Secretary Reed said:

We cannot look in depth at every single industrial discharge, but the ones we foresee are going to have a major environmental impact we do review in depth . . . . Hearings Before the Subcommittee on Fish and Wildlife Conservation and the Environment of the Committee on Merchant Marine and Fisheries (93d Cong., 2d Sess.) on GAO Report B-118370 and H.R. 42, H.R. 2285, H.R. 2288, H.R. 2291, H.R. 2292, H.R. 10651, and H.R. 14527 (Serial No. 93-33) at 583 [hereinafter "Coordination Act Hearings"]. (Emphasis supplied.)

The same point is clear in the proposed regulations which presumably represent the considered position of the Department of the Interior since they are to provide interim

guidance to the Fish and Wildlife Service pending promulgating of final regulations (39 Fed. Reg. 29552, Aug. 15, 1974):

All public notices of applications for permits received from the Corps, EPA, or Coast Guard are then screened to exclude from further consideration those where the proposal obviously will have no impact or at most an inconsequential impact on fish and wildlife resources. Navigable Waters Handbook, Sec. 3.1(B). 39 Fed. Reg. 29555 (Aug. 15, 1974) (Emphasis supplied).

The need for consultation in the instant case is likewise established by these regulations: The proposed regulations consistently emphasize the particular efforts which are to be undertaken to protect wetlands. Witness the repeated references to wetlands in the section of the regulations on "Objectives and Policies":

For nonwater-dependent works, particularly where biologically protective wetlands are involved and alternative upland sites are available . . . the [Fish and Wildlife] Service usually recommends denial of a permit . . . Sec. 2.1(B)(1)(a), 39 Fed. Reg. 29555.

For water-dependent works, the Service discourages the occupation and destruction of biologically productive wetlands and shallows. Sec. 2.1(B)(1)(b), Id. The Service places special emphasis on vegetated and other productive waters and wetlands . . . Sec. 2.1(B)(2), Id.



The lack of personnel is not a sufficient reason to avoid statutory mandates. The present situation, however, is aggravated by the fact that Interior chose itself to limit its personnel, and thereby accomplish effective executive repeal of a legislative enactment.

The public record establishes that the "present lack of personnel" is more the fault of the executive branch than of Congress. This is not a case in which Congress assigns duties but will not fund them; rather, it posits the example in which an agency has duties but will not request the funds to carry them out. Throughout the Coordination Act Hearings, on which the federal defendants relied below to show the heavy workload which has fallen on Interior, it becomes apparent that Interior is not requesting the necessary funds in order to carry out its duties under the Coordination Act. For instance, Congressman Reuss points out that his committee "recommended that Interior seek adequate funds from Congress to carry out its Coordination Act duties effectively and timely." Coordination Act Hearings at 121.

Interior did not request the personnel it needed. The GAO Report on the administration of the Fish and Wildlife Coordination Act estimated that an additional 408 positions

were needed in the program. Interior agreed, but requested positions and funding for only about half that number. Letter of Douglas P. Wheeler, Deputy Assistant Secretary of the Interior to Congressman Dingell. Coordination Act Hearings at 601.

Thus even in the budgetary process, we have a form of administrative repeal of the statute being carried on. The executive branch appears to have decided not to follow the mandate of the Fish and Wildlife Coordination Act fully and through low budget and personnel requests has created a situation in which it can claim that compliance with the Act is beyond its capacities. Interior's conduct leaves unprotected the interests of the Appellants-Petitioners. It erodes, if not usurps, the Congressional role. It is a repealer of rights by executive fiat rather than by considered legislative judgment.

No other court has read the Coordination Act as did the District Court below. In Environmental Defense Fund v. Froehlke, 473 F.2d 346, 356 (8th Cir., 1972), the court had before it a channelization project of the Corps of Engineers in which considerable review and comment had



been received from the Department of the Interior; the court found that

"The Fish and Wildlife Coordination Act . . . does require government agencies . . . to coordinate their activities so that adverse effects on fish and wildlife will be minimized."

The ruling in E.D.F. v. Froehlke was followed in Akers v. Resor, 339 F.Supp. 1375, 1380 (W.D. Tenn. 1972); the court again emphasized the mandatory nature of the Coordination Act:

"It is completely clear from a reading of the provisions of 16 U.S.C. §661 et seq. that a construction agency such as the Corps must consult in good faith with the ecology agencies and give their recommendations due consideration."

The District Court's novel and unsupportable construction of the Coordination Act must be reversed.

#### IV.

JURISDICTION TO REVIEW DIFFERENT CLAIMS  
AS TO THE INVALIDITY OF THE NPDES PERMIT  
VESTS CONCURRENTLY IN THIS COURT AND THE  
DISTRICT COURT, AND THE RULING BELOW TO  
THE CONTRARY SHOULD BE REVERSED.

The jurisdictional question here presents issues of first impression. This is the first NPDES Permit subjected to judicial review. The case presents the need for clarifying the Water Act's two provisions for judicial enforcement and for construing these provisions in tandem with other jurisdictional statutes.

A. Jurisdiction Was Properly Invoked In The District Court Below And It Erred In Holding Otherwise

The Appellants-Petitioners have here presented three categories of claims arising under Federal law:

- (1) Claims arising under statutes or regulations wholly separate from the Water Act in form and origin;
- (2) Claims arising from the EPA's failure to perform duties mandated by the Water Act; and
- (3) Claims arising from the manner of issuance and substantive content of the effluent limitations of the Water Act.



Initially, as plaintiffs below, Appellants-Petitioners presented the first set of claims involving due process of law, the wetlands' regulations and Fish & Wildlife Coordination Act. These are the issues set forth in Points I and III above. Subject matter jurisdiction over these issues was founded upon federal question jurisdiction, 28 U.S.C. 1331, and the Administrative Procedure Act, 5 U.S.C. 701, et seq. Jurisdiction over the claims seeking enforcement of the EPA's duties under these acts was based upon the mandamus authority, 28 U.S.C. 1361, and the general equity jurisdiction inherent in the District Court to enforce these legal duties which exist concurrently with, but independently of, the Water Act. Amos Treat & Co. v. SEC, 306 F.2d 260, 267 (D.C. Cir. 1962); R.H. Macy & Co. v. Tinley, 249 F.Supp. 778 (D.C., D.C. 1965).\*

Section 505(c) of the Water Act, 33 U.S.C. 1365(e), expressly provides that "Nothing in this section shall restrict any right which any person may have under any statute or common law. . .to seek any other relief (includ-

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\*It nowhere appears from the legislative history and judicial interpretations of the Water Act that Congress desired to curb the general equity power of the District Court, and such an inference cannot be drawn here. Porter v. Warner, 328 U.S. 395 (1946); Mitchell v. D. Mario Jewelry, 361 U.S. 288 (1960). See The Conference Report No. 92-1236, 1972 U.S. Code Cong. & Admin. News (Vol. 2) at pp. 3822-3 and 3825.

ing relief against the Administrator. . .)." See also the express preservation of other statutory authority in §510 of The Water Act, 33 U.S.C. 1371. The Appellants-Petitioners were entitled to raise these issues in the District Court. The Water Act's remedies "supplement and amplify any pre-existing remedies." U.S. v. U.S. Steel Corp., 356 F.Supp. 556 (N.D. Ill., 1973); accord, Save Our Sound Fisheries Assoc. v. Callaway, 387 F.Supp. 292 (D.R.I., 1974).<sup>\*</sup> Cf. City of Highland Park v. Train, 4 E.L.R. 20677 (N.D. Ill., 1974) construing claims involving the analogous similar provisions of the Clean Air Act, 42 U.S.C. 1857(h), and claims raised separately under 28 U.S.C. 1331 (federal question) and 28 U.S.C. 1361 (mandamus).

The second class of claims involved the EPA's failure to adhere to the mandatory requirements of the Water Act under §302, 33 U.S.C. 1332, and §402, 33 U.S.C. 1342, and the regulations promulgated thereunder. Once the sixty days had passed, the Appellants-Petitioners amended their complaint to assert the new claims under the jurisdiction of §505 of the Water Act, 33 U.S.C. 1365. These claims involve enforcement of the Water Act's provisions outlined in Point II above, except for the review of the sufficiency of effluent discharge limitations. Cf. Hagedorn v. Union Carbide Corp., 363 F.Supp. 1061, 1067 (N.D., W. Va., 1973).

<sup>\*</sup> See also N.R.D.C. v. Quarles, -- F.Supp. --, 6 E.R.C. 1702 (Civ. No. 1629-73, D.D.C., May 23, 1973) where jurisdiction was accepted but the Court dismissed on other grounds.



The effluent limitations are reviewable expressly under §509 of the Water Act, 33 U.S.C. 1369; these involve the third class of claims. These claims are raised only in the instant Petition No. 75-4164.

The District Court held that, in fashioning the provision of §509, 33 U.S.C. 1369, which require judicial review of NPDES Permits in the Circuit Court of Appeals, Congress meant to create an exclusive remedy, eclipsing the jurisdictional foundations of the first class of claims (federal question, mandamus, and the APA) and the second class of claims (§505 of the Water Act, 33 U.S.C. 1365).

To preserve the rights of the plaintiffs below while appealing from the District Court's final judgment dismissing the challenges to the NPDES Permit for lack of jurisdiction, these parties also filed their Petition presenting the same issues under §509 of the Water Act, 33 U.S.C. 1369.

Had the District Court agreed with the jurisdictional contentions of Appellants-Petitioners, it should have invalidated the NPDES Permit for the violations of due process of law (Point I, supra) and breach of the Fish & Wildlife Coordination Act (Point III, supra).

Once the permit was invalidated, the mandamus and \$505 citizen suit provisions would have required the EPA to adhere to the legal duties asserted. In any further application for a new NPDES Permit, the interests of the Appellants-Petitioners would be protected. The District Court erred in holding that none of this jurisdiction existed.

The District Court's ruling on the Fish & Wildlife Coordination Act is necessarily posited upon its unstated finding that it had jurisdiction over that claim insofar as it involved Interior. The Court below declined to consider EPA's role in issuing the NPDES Permit without benefit of consultation. This bifurcation of jurisdiction over claims under the Fish and Wildlife Coordination Act is not required by the Water Act and is in error.

- B. Alternatively, If The District Court Is Upheld, This Court May Rule On The Merits Of Petitioners' Claims Which Are Timely Presented.

The Appellants-Petitioners here are interested principally in the merits of their claims. Since injury is present and continuing, they seek immediate relief. They were caught in an ambiguous statutory scheme as to where jurisdiction was vested over their federal claims. However this Court decides to clarify the Congressional allocation of



jurisdiction, the Appellants-Petitioners pray that it will reach the merits of their claims that the NPDES Permit was issued unlawfully.

Having argued below that §509 of the Water Act, 33 U.S.C. 1369, is exclusive, the Respondent EPA now opposes the hearing of the instant Petition. It does so by arguing that the 90 day period provided by §509 is a statute of limitations to be strictly construed against the Appellants-Petitioners. It also urges that the data submitted as to effluent content and injury after the HHW sewage treatment discharges began, does not constitute "grounds which arose after such ninetieth day." §509(b)(1)(F)

However, the 90 day period is not an absolute time bar as shown below. Even if applicable, the EPA's failure to give the Appellants-Petitioners notice and the institution of this Petition promptly after the District Court's ruling on jurisdiction constitute facts of an equitable tolling the 90 day limit. Alternatively, the presentation of actual facts gathered and evaluated when the sewage treatment discharges began, some eight months after issuance of the NPDES Permit, constitutes grounds which arose necessarily after the 90 day period.

In any event, this Court should not be barred from reviewing the merits of the claims presented.

Congress clearly intended that parties should have their right to review and that facts as to actual operation under a NPDES Permit should be the basis for judicial review of such a Permit after the 90 day period. The Senate Report states that "the judicial review section, therefore, provides that any person may challenge any requirement after the date of promulgation whenever it is alleged that significant new information has become available." SENATE REP. No. 92-414, Vol. 2, 1972 U.S. CODE CONG. & ADMIN. NEWS 3669 at 3751. The Conference Report similarly expressly provides that "the conferees do not intend to, in any way, affect the right of a party for which judicial review was not available." CONFERENCE REP. No. 92-1236, Vo. 2, 1972 U.S. CODE CONG. & ADMIN. NEWS 3776 at 3825.

Rather than an absolute time bar, this legislative history for §509 shows a receptivity to review where warranted by (i) either unavailability of judicial review or by (ii) new factual developments.

With respect to unavailability of judicial review, it is EPA's violation of due process of law by failing to give



notice which has caused Petitioners' unavoidable delay in filing its Petition. The absence of effective notice here has made judicial review unavailable. Due process requires effective notice. See, e.g., Walker v. Hutchinson, 352 U.S. 112 (1956); see generally, DAVIS, I ADMIN. L. TREATISE §8.04 (1958 Ed.).

Absent this requisite notice, it is clear that Petitioners never had the reality of available judicial review. In moving to dismiss this Petition, EPA exalts form over substance. It urges that Sun and Kipp had received notice and yet failed to act, in view of the fact that they had discovered on September 19, 1974, that the NPDES Permit had been issued. The remaining days of the 90 day period were spent investigating whether the EPA had properly exercised its discretion in fixing the effluent limitations in the NPDES Permit. That process could not be finished before the 90th day.

With respect to grounds arising solely after the 90 day period, the provisions of §509(c), 33 U.S.C. §1369(c), envision clearly that parties can petition to reopen the administrative proceedings where, as with NPDES permits, they involve opportunity for a notice, hearing and decision on a record. The EPA has refused Petitioners' requests to

reopen the proceedings sua sponte or upon request of Petitions unless HHW, as permittee, agreed. EPA apparently feared suit by HHW. Since HHW has been obstinate in refusing to modify its sewage discharge scheme, the Petitioners have been forced to litigate to force EPA to reopen the issue of the NPDES Permit.

EPA is incorrect in arguing that the 90 day period is an inflexible statute of limitations which must be entirely construed to bar Petitioners here. The plain meaning of both the last sentence of §509(b) and §509(c) suggest otherwise. Such a statutory construction is buttressed by the legislative history.

Both S.2770 and H.R. 11896, the bills which were the basis for P.L. 92-500, contained the language authorizing judicial review if the petition is based solely on grounds arising after the thirtieth day from issuance of the regulation or permit. See S.2770, p. 180 and H.R. 11896, p. 387; both bills are reprinted in Leg. Hist. at pp. 1574 and 1081, respectively.



The Senate Report No. 92-414, at p. 85, in its section analysis of §509, observed as follows:

"The Committee recognizes that it would not be in the public interest to measure for all time the adequacy of a promulgation of any standard requirement or regulation by the information available at the time of such promulgation. In the area of protection of public health and environmental quality, it is clear that new information will be developed and that such information may dictate a revision or modification of any promulgated standard, requirement or regulation established under the act. The judicial review section, therefore, provides that any person may challenge any requirement after the date of promulgation whenever it is alleged that significant new information has become available." Vol. 2, 1972 U.S. CODE CONG. & ADMIN. NEWS at 3751; Leg. Hist. at 1503.

This observation is typical of the entire legislative history. Section 509 chiefly involved a concern for judicial review of broad regulations, not NPDES Permits. Thus, in the analysis made by EPA Administrator, William Ruckelshaus, the role of review is broadly framed:

"A judicial review of Administrator's action in promulgating standards, determining new source performance standards, effluent limitations, prohibitions, etc., or in issuing or denying any permit may be obtained by interested persons in the U.S. Court of Appeals for the appropriate circuit." Leg. Hist. at p. 147.

At the time of enactment, EPA made no mention of time limits. Also by letter of December 13, 1971, Administrator Ruckelshaus advised the House Public Works Committee of EPA's views of the bills without the slightest mention of time limits. See Leg. Hist. at p. 1191 and p. 1207; and the same at p. 834 and 356.

The only remotely relevant discussion of the functions intended for the time limits appears in the House Report, No. 92-911, at p. 136, reprinted in Leg. Hist. at p. 823:

"The Committee believes with the number and complexity of administrative determinations that the legislation requires[,] there is a need to establish a clear and orderly process for judicial review. Section 509 will ensure that administrative actions are reviewable, but that review will not unduly impede enforcement.

"The Committee further notes that the inclusion of §509 is not intended to exclude judicial review under other provisions of the legislation that are otherwise permitted by law."

Nowhere does Congress evidence the concern, pressed by the EPA's counsel here, that a strict statute of limitations be instituted. Nor does the only reported judicial construction of §509 alter this record.



The EPA is misguided in placing reliance on Peabody Coal v. Train, No. 74-1619, 7 E.R.C. 2125 (6th Cir., July 10, 1975), for its proposition that the 90 days is an absolute time bar to the instant Petition.

In the first place, Peabody Coal involved a review of regulations under §509(b)(1)(D), not a NPDES Permit review. Different policy considerations apply to the broad review of Ohio's statewide implementation of the NPDES Permit procedure than apply to review of the sufficiency of a single NPDES Permit issued by the EPA under §509(b)(1)(F). Finality of a procedure for an entire State is needed where the State program embodies Congress' mandate of cleaning the nation's waters by 1985. Where a single NPDES Permit allows pollution of hitherto pure drinking and trout stream waters, just the opposite policies come to bear; review of EPA's conduct, in insufficiently protecting water quality is necessary to enforce the same Congressional mandate.

Moreover, unlike Peabody Coal, Petitioners here establish that they in fact did not have timely or adequate notice of the EPA's decision in granting the NPDES Permit. The Peabody Coal case turned on an interpretation of when the 90 day period began; no one contests the proposition here that the 90 day period began when the NPDES Permit

issued on July 12, 1974. The issues here, unlike those in Peabody Coal, are what constitutes either equitable tolling of the limitation period or grounds arising solely after the 90 days has expired.

Further, Peabody Coal's reference to §307(b) of the Clean Air Act, 42 U.S.C. 1857 and 1857h-5(b)(1), shows that its focus was on national or statewide standards and standard or regulation setting, not judicial review of specific emission permits.

Also, insofar as the Court in Peabody Coal ruled that it lacked jurisdiction, it made it clear that it did not view as applicable the last sentence of §509 where Congress gave parties the right to raise claims arising after the 90 day period and necessarily gave the relevant Circuit Court jurisdiction to interpret the Act to hear such claims.

Moreover, the "set-up" of issues in Peabody Coal involved delaying tactics in compliance with the Water Act; here the grievances are actual and designed to advance the remedial ends of the Water Act. There is no "stale claim" or failure of notice to the EPA or HHW



because of the passage of time, Burnett v. N.Y. Cent. R. Co., 380 U.S. 424, 85 S.Ct. 1050 (1965); Isthmian Lines Inc. v. Rosling, 360 F.2d 926 (2d Cir., 1966); the policy basis for finding a statute of limitations here does not exist.\*

\* Similarly, no basis for application of laches is applicable here. Appellants-Petitioners have vigorously pressed their claims. This Court has cautioned against resort to laches in environmental cases, Steubing v. Brinegar, Docket Nos. 74-1911, 74-2162, slip op. at 1811 (2d Cir., Feb. 13, 1973). Since the governmental agencies and private parties all had notice of the interests of Appellants-Petitioners, and alternative disposal means exist for the sewage treatment effluent, no basis in equity exists for denying relief. All administrative remedies have been pursued and no delay in the private permittee's plans is sought or necessarily occasioned by this suit. Cf. Sierra Club v. Butz, 349 F.Supp. 934, 4 E.L.R. 20371, Docket No. A-16-70 (D. Alas., May 6, 1974). To do equity here is to hear this case. Holmberg v. Armbrrecht, 327 U.S. 392, 396 (1946).

V.

APPELLANTS-PETITIONERS ARE ENTITLED TO NULLIFICATION OF THE NPDES PERMIT AND INJUNCTION OF THE EFFLUENT DISCHARGES.

Appellants-Petitioners are currently being damaged by the EPA's decision to allow new pollutants to contaminate Brown Brook and No Bottom Marsh. The present harm becomes irreparable once the aquifer is defiled.

Since this pollution exists despite Congressional mandates to prevent it, and since Appellants-Petitioners have been denied their basic constitutional right to due process of law, the full measure of relief sought should be granted here.

Additionally, as Mr. Justice Frankfurter observed in Scripps-Howard Radio v. F.C.C., 316 U.S. 4, 15, 62 S. Ct. 875, 882 (1942):

"'Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved.' Virginia Ry v. Systems Federation, 300 U.S. 151, 552, 57 S. Ct. 592, 601, 81 L.Ed. 789. . . . [to deny a request to preserve rights during an appeal would stultify the purpose of Congress to utilize the courts as a means for vindicating the public interest."



What is required here to protect the interests of Appellants-Petitioners in Brown Brook and No Bottom Marsh, their drinking water and other resources, is to stop the pollution. Stop it now, before the aquifer is reached and while the surface ecosystems can be restored. Stop it whether this Court remands the NPDES Permit to the EPA under §509(c) of the Water Act, 33 U.S.C. 1369(c), or whether remand is to the District Court following reversal.

It is beyond cavil that EPA and Interior have grossly neglected the rights of Appellants-Petitioners and flouted the will of Congress. The NPDES Permit must be declared void. The additional precaution of enjoining use of the sewage treatment discharge pipe is necessary. The discharge can be taken away for disposal elsewhere commercially in tank trucks. Eventually, the pipe can be relocated elsewhere or the treatment plant can be upgraded. These are choices with which this Court need not concern itself.

What is within the province of this Court is its responsibility to protect the interests of the public and of the Appellants-Petitioners during the interim period while a new NPDES Permit is sought which does not pollute spring water, kill fish or destroy marshes.

Without an Order barring the sewage treatment discharge, Appellants-Petitioners have no protection. The intervening parties, such as HHW, would be inconvenienced by having to ship their sewage wastes elsewhere, but this is the risk HHW assumed in starting up its sewage plant after suit was commenced in the District Court and despite notice that the NPDES Permit was unlawfully granted.

Moreover, this Court should enjoin issuance of a new NPDES Permit until and unless all the procedural and substantive deficiencies presented here are corrected. See, e.g. Calvert Cliffs' Coord. Comm. v. U.S. A.E.C., 449 F.2d 1109 (D.C. Cir., 1971); National Helium Corp. v. Morton, 455 F.2d 650 (10th Cir., 1971).

Unlike Save Our Sound Fisheries Assoc. v. Callaway, 387 F.Supp. 292 at 309-310 (D.R.I., 1974), where an injunction was not needed because no injury had occurred, the harm here is not prospective. Damage in the case at bar is continuing in a crescendo toward irreparability. Accordingly, the injunction prayed for should issue here.

#### CONCLUSION

NPDES Permit No. N.Y. 0026891 should be declared null and void and the mandate issued to revoke it. EPA and Interior should be enjoined to implement the provisions of



law discussed in the Points I through III above. Use of the sewage treatment discharge pipe should be enjoined until and unless a valid new NPDES Permit is granted.

Dated: New York, New York  
October 20, 1975

Respectfully submitted,

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LEGAL ADDENDUM:

STATUTES AND REGULATIONS INVOLVED

A. The Federal Water Pollution Control Act Amendments of 1972, P.L. 92-500; 86 Stat. 816, 33 U.S.C. §1251 et seq.:

1. 33 USC §1311. Effluent limitations -- Illegality of pollutant discharges except in compliance with law

(a) Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful....

2. 33 USC §1312. Water quality related effluent limitations

(a) Whenever, in the judgment of the Administrator, discharges of pollutants from a point source or group of point sources, with the application of effluent limitations required under section 1311(b)(2) of this title, would interfere with the attainment or maintenance of that water quality in a specific portion of the navigable waters which shall assure protection of public water supplies, agricultural and industrial uses, and the protection and propagation of a balanced population of shellfish, fish and wildlife, and allow recreational activities in and on the water, effluent limitations (including alternative effluent control strategies) for such point source or sources shall be established which can reasonably be expected to contribute to the attainment or maintenance of such water quality....

3. 33 USC §1342. National pollutant discharge elimination system --Permits for discharge of pollutants

(a)(1) Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or prior to the taking of necessary implementing actions relating to all such requirements, such conditions



as the Administrator determines are necessary to carry out the provisions of this chapter.

(2) The Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) of this subsection, including conditions on data and information collection, reporting, and such other requirements as he deems appropriate.

(3) The permit program of the Administrator under paragraph (1) of this subsection, and permits issued thereunder, shall be subject to the same terms, conditions, and requirements as apply to a State permit program and permits issued thereunder under subsection (b) of this section.

(4) All permits or discharges into the navigable waters issued pursuant to section 407 of this title, shall be deemed to be permits issued under this title, and permits issued under this title shall be deemed to be permits issued under section 407 of this title, and shall continue in force and effect for their term unless revoked, modified, or suspended in accordance with the provisions of this chapter.

(5) No permit for a discharge into the navigable waters shall be issued under section 407 of this title, pending on October 18, 1972, shall be deemed to be an application for a permit under this section. The Administrator shall authorize a State, which he determines has the capability of administering a permit program which will carry out the objective of this chapter, to issue permits for discharges into the navigable waters within the jurisdiction of such State. The Administrator may exercise the authority granted him by the preceding sentence only during the period which begins on October 18, 1972, and ends either on the ninetieth day after the date of the first promulgation of guidelines required by section 1314(h) (2) of this title, or the date under subsection (b) of this section, whichever date first occurs, and no such authorization to a State shall extend beyond the last day of such period. Each such permit shall be subject to such conditions as the Administrator determines are necessary to carry out the provisions of this chapter. No such permit shall issue if the Administrator objects to such issuance....

4. 33 USC §1365. Citizen suits -- Authorization; jurisdiction

(a) Except as provided in subsection (b) of this section, any citizen may commence a civil action on his own behalf--

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 1319(d) of this title....

5. 33 USC §1369. Administrative procedure and judicial review

...(b)(1) Review of the Administrator's action...(F) in issuing or denying any permit under section 1342 of this title, may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts such business upon application by such person. Any such application shall be made within ninety days from the date of such determination, approval, promulgation, issuance or denial, or after such date only if such application is based solely on grounds which arose after such ninetieth day.

(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) of this subsection shall not be subject to judicial review in any civil or criminal proceeding for enforcement.

(c) In any judicial proceeding brought under subsection (b) of this section in which review is sought of a determination under this chapter required to be made on the record after notice and opportunity for hearing, if any party applies to the court for leave to adduce additional evidence, and shows to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Administrator, the court may



order such additional evidence (and evidence in rebuttal thereof) to be taken before the Administrator, in such manner and upon such terms and conditions as the court may deem proper. The Administrator may modify his findings as to the facts, or make new findings, by reason of the additional evidence so taken and he shall file such modified or new findings, and his recommendation, if any, for the modification or setting aside of his original determination, with the return of such additional evidence....

B. The Fish & Wildlife Coordination Act, as amended, 16 USC §662. Impounding, diverting, or controlling of waters -- Consultations between agencies

(a) Except as hereafter stated in subsection (h) of this section, whenever the waters of any stream or other body of water are proposed or authorized to be impounded, diverted, the channel deepened, or the stream or other body of water otherwise controlled or modified for any purpose whatever, including navigation and drainage, by any department or agency of the United States, or by any public or private agency under Federal permit or license, such department or agency first shall consult with the United States Fish and Wildlife Service, Department of the Interior, and with the head of the agency exercising administration over the wildlife resources of the particular State wherein the impoundment, diversion, or other control facility is to be constructed, with a view to the conservation of wildlife resources by preventing loss of and damage to such resources as well as providing for the development and improvement thereof in connection with such water-resource development....

C. EPA Regulations For Notice, 38 Fed. Reg. 135727-13540, at 13535-6, 40 C.F.R. §125.32. Public notice.

(a) Public notice of every complete application for a permit shall be circulated in a manner designed to inform interested and potentially interested persons of the discharge and of the proposed determination to issue or to deny a permit for the discharge. Public notice of hearings shall be circulated in a manner designed to inform interested and potentially interested persons of the discharge and of the intention to hold a hearing on the matter of the proposal to issue or deny a permit for the discharge. Procedures for the circulation of public notice shall include at least the following:

(1) Notice shall be circulated within the geographical area of the proposed discharge, such circulation shall include any one of the following:

(i) Posting in the post office and public places of the municipality nearest the premises of the applicant in which the effluent source is located;

(ii) Publishing in local newspapers and periodicals, if of appropriate, in a daily newspaper of general circulation; except that public notice of hearings shall be published in at least one newspaper of general circulation with the geographical area of the discharge in all cases.

(2) Notice shall be mailed to the applicant and to any person or group upon request; and

(3) The Regional Administrator shall add the name of any person or group upon request to a mailing list to receive copies of notices for all applications within the State or within a certain geographical area.

(4) Regional Administrators shall notify Federal and State fish, shellfish, and wildlife resource agencies and other appropriate government agencies of each complete application for a permit and of hearings and shall provide such agencies an opportunity to submit their written views and recommendations on each complete application....

D. EPA Regulations For Consulting Interior, 38 Fed. Reg. 13527 at 13532-33, 40 CFR §125.4(f)(1)

(f)(1) Complete copies of all applications filed with the Environmental Protection Agency subsequent to June 1, 1973, shall be furnished to the Department of the Interior and Department of Commerce for comment, provided that these agencies may waive their right to receive any permit applications or categories thereof. Regional Administrators shall meet with appropriate officials of the Department of Interior and Department of Commerce in order to reach agreement as to which existing application forms (filed prior to June 1, 1973) those agencies are to receive. Complete copies of all application forms requested shall be made available to those agencies for comment. When an application is transmitted to these agencies, accompanying it will be a notice that the Environmental Protection Agency has received a request for a permit to discharge and that the agencies have a stated



number of days in which to evaluate the impact of granting such permit upon the fish, shellfish, and wildlife resources of the State in which the discharge will occur, and to advise the Regional Administrator of their evaluations. The normal period of time to evaluate the effects of the discharge on fish, shellfish, and wildlife resources will be 30 days. In all cases the Regional Administrator should advise the agencies that failure to answer within the allotted period of time will be deemed to be a statement that the agencies do not choose to comment at this time. Where the agencies advise the Regional Administrator that the imposition of specified conditions upon the permit is necessary to avoid substantial impairment of the fish, shellfish, or wildlife resources, the Regional Administrator may include in the permit those conditions so specified by the agencies. Where the agency notifies the Regional Administrator that more time is needed for its evaluation more time will be granted where it appears to the Regional Administrator that the public interest warrants such extension.

E. EPA Regulations For Protection of Nation's Wetlands, 38 Fed. Reg. 10834-5 (May 2, 1973).

1. Purpose - The purpose of this statement is to establish EPA policy to preserve the wetland ecosystems and to protect them from destruction through waste water or nonpoint source discharges and their treatment or control or the development and construction of waste water treatment facilities or by other physical, chemical, or biological means.

2. The wetland resource -

(a) Wetlands represent an ecosystem of unique and major importance to the citizens of this Nation and, as a result, they require extraordinary protection. Comparable destructive forces would be expected to inflict more lasting damage to them than to other ecosystems. Through this policy statement, EPA establishes appropriate safeguards for the preservation and protection of the wetland resources.

(b) The Nation's wetlands, including marshes, swamps, bogs, and other lowlying areas, which during some period of the year will be covered in part by natural nonflood waters, are a unique, valuable, irreplaceable water resource. They serve as a habitat for important fur-bearing mammals, many species of fish, and waterfowl. Such areas moderate extremes in waterflow, aid in the natural purification of water, and maintain and recharge the ground water resource. They are

the nursery areas for a great number of wildlife and aquatic species and serve at times as the source of valuable harvestable timber. They are unique recreational areas, high in aesthetic value, that contain delicate and irreplaceable specimens of fauna and flora and support fishing, as well as wildfowl and other hunting....

(d) Protection of wetland areas requires the proper placement and management of any construction activities and controls of nonpoint sources to prevent disturbing significantly the terrain and impairing the quality of the wetland area. Alteration in quantity or quality of the natural flow of water, which nourishes the ecosystem, should be minimized. The addition of harmful waste waters should be kept below a level that will alter the natural, physical, chemical, or biological integrity of the wetland area and that will insure no significant increase in nuisance organisms through biostimulation.

### 3. Policy... -

(d) To promote the most environmentally protective measures, it shall be the EPA policy to advise those applicants who install waste treatment facilities under a Federal grant program or as a result of a Federal permit that the selection of the most environmentally protective alternative should be made. The Department of the Interior and the Department of Commerce will be consulted to aid in the determination of the probable impact of the pollution abatement program on the pertinent fish and wildlife resources of wetlands. In the event of projected significant adverse environmental impact, a public hearing on the wetlands issue may be held to aid in the selection of the most appropriate action, and EPA may recommend against the issuance of a section 10 Corps of Engineers permit.

4. Implementation - EPA will apply this policy to the extent of its authorities in conducting all program activities, including regulatory activities, research, development and demonstration, technical assistance, control of pollution from Federal institutions, and the administration of the construction and demonstration grants, State program grants, and planning grants programs.



# DOCUMENTARY APPENDIX

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Pages A1-A17, Exhibits from Affidavit of Nicholas A. Robinson, sworn to January 7, 1975; Document 7 on Appeal.

Pages A17-A19, Exhibit from Affidavit of Richard Tisch, sworn to January 20, 1975; Document 29 on Appeal.

Pages A20-A28, Exhibits from Affidavit of Nicholas A. Robinson, sworn to January 7, 1975; Document 7 on Appeal.

Pages A29-A59 are the Opinion #42395, filed May 9, 1975, of the Hon. Dudley B. Bonsal, US.D.J., S.D.N.Y., in Sun Enterprises, Ltd., et al. v. Train, et al., 75 Civ. 68, the principal ruling in the case below.





RC  
Cowan  
DPC

SPRING O'KEEFE & FLORENCE  
COUNSELLORS AT LAW  
DEMPSEY BUILDING  
PEEKSKILL, N.Y. 10566  
(914) 737-1010

WHITE PLAINS OFFICES  
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CABLE DEMLEX

JOHN J. DEMPSEY  
JOHN J. SPRING  
THOMAS O'KEEFE  
WILLIAM J. FLORENCE, JR.  
WILLIAM A. SICHOL  
DAVID P. TILHONEN  
ANDREW W. TULLY, JR.  
HERWOOD E. SILLIMAN  
COUNSEL

October 31, 1973

ADDRESS REPLY TO PEEKSKILL OFFICES

Mr. Henry Diamond  
Commissioner  
Department of Environmental Conservation  
Albany, New York

Re: Application of Heritage Hills, Town of Somers,  
Westchester County, New York, under Chapter  
801 of the Laws of New York State 1973  
(SPDES Application)

Dear Commissioner Diamond:

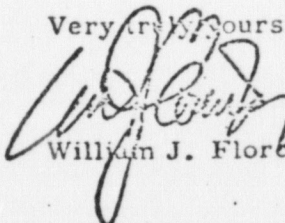
I am writing on behalf of an objectant, Sun Enterprises,  
Ltd., a downstream owner to the applicant the Heritage Group.

At an earlier hearing for a Water Supply Application, I  
inferred from the testimony and the exhibits offered in evidence  
at that hearing, that it was the intention of the Heritage Group to  
deposit sewage effluent into a stream known as the Brown Brook.

This letter is only to put the department and your  
representatives on notice to any such application, if as and  
when one may be made, and the request that we be so noticed at  
the time of a making of such application in order that ~~we~~ may  
determine our objections.

Thank you for your anticipated cooperation and assuring  
you of ours, I am,

Very truly yours,

  
William J. Florence, Jr.

WJF:er

Via Certified Mail

DEMPSEY SPRING O'KEEFE & FLORENCE

COUNSELLORS AT LAW  
DEMPSEY BUILDING  
PEEKSKILL, N.Y. 10566  
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2 DEMPSEY  
101 J. SPRING  
101 J. O'KEEFE  
101 J. FLORENCE, JR.

1 A. BICHOL  
1 R. TIIMONEN  
1 W. W. TULLY, JR.  
1 EDWARD E. SILLIMAN  
COUNSEL

ADDRESS REPLY TO PEEKSKILL OFFICES

January 11, 1974

State of New York,  
Department of Environmental  
Conservation, Division of Pure Waters  
Room 300  
50 Wolf Road  
Albany, New York

Re: Department of Conservation No. NY-55-001

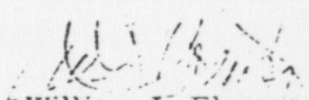
Gentlemen:

This letter is written on behalf of Sun Enterprises, Ltd.  
who is a downstream owner of the Brown Brook, a brook in which  
there is a proposed discharge by various entities owned and  
controlled by Curtis McGann and Henry Papparazzo and H & H  
Land Corporation.

I am prepared to produce expert testimony as to the effect  
of such discharge on the Brown Brook and to produce testimony  
demonstrating that there is in fact an emergency pursuant to the  
regulations of your department in view of the certain alternatives  
and that those alternatives would produce less harm to the waters  
of the State of New York and substantially less damage to the  
waters of the City of New York.

To date this testimony has not been given in any hearing  
or any report and accordingly my client is an interested party  
in this application and further I wish to have an opportunity to  
produce expert testimony as it relates to this application not  
heretofore given.

Very truly yours,

  
William J. Florence, Jr.

WJF/ac





UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION II  
26 FEDERAL PLAZA  
NEW YORK, NEW YORK 10007

January 17, 1974

Mr. William L. Garvey  
Chief, Enforcement Section  
New York State Dept. of  
Environmental Conservation  
50 Wolf Road  
Albany, New York 12201

Re: Certification of Permits to be  
Issued under Section 402 of the  
FWPCA of 1972

Dear Mr. Garvey:

The United States Environmental Protection Agency has received an application for a permit under the National Pollutant Discharge Elimination System (NPDES) from the following dischargers in your state:

<u>Discharger and Location</u>	<u>Permit Application Number</u>
Jefferson Valley Corp. Shrub Oak, New York	NY 0026611
Kaufman and Broad Homes, Inc. Staten Island, New York	NY 0026760
H & H Land Corp. Schenectady, New York	NY 0026891
N.Y.C. Bureau of Water Supply Dept. of Water Resources Roxbury, New York	NY 0026565
We Walker Campsite Mayfield, New York	NY 0022527

The United States Environmental Protection Agency proposed to issue a NPDES permit to these dischargers. Enclosed please find a copy of the draft NPDES permit for each discharger.

Pursuant to Section 401 of the Federal Water Pollution Control Act Amendments of 1972 (FWPCA), before the Environmental Protection Agency can issue final permits to these dischargers, your agency must, for each discharger listed above, (1) certify that the discharges will comply with the applicable provisions of Sections 301, 302, 306, and 307, or (2) certify that there are no applicable effluent or other limitations under Sections 301(b) and 302 and there are no applicable standards under Section 306 and 307, or (3) deny such certification or (4) waive its right to certify or to deny such certification.

I request that your agency examine the enclosed material and provide the certification required by Section 401 of the FWPCA of 1972 for the dischargers listed above.

Section 401 of the FWPCA of 1972 provides in part:

"(i) If the State, interstate agency, or Administrator, as the case may be, fails or refuses to act on a request for certification, within a reasonable period of time... after receipt of such request, the certification requirements of this subsection shall be waived...."

EPA is, concurrently with this request for certification, publishing Public Notice of its intent to issue a NPDES permit to these dischargers. A copy of the Public Notice concerning each discharger is also enclosed.

At your agency's request, the full 90 day period indicated by relevant regulations as a "reasonable period of time" is provided for certification. Therefore, your certification for their dischargers should be received no later than April 17, 1974. Representatives of EPA and NYSDEC have discussed the procedure for certification of discharges of the nature of those listed in this letter. It is the hope of both our agencies that because of the nature of these discharges and the extent of the documentation included with this request that the certification procedure for these discharges can be expedited. Thank you for your cooperation in this regard.



Please give this matter your prompt attention. Your cooperation is essential if the Congressionally-mandated goals for pollution abatement are to be met.

Sincerely yours,  
MEYER SCOLNICK  
Director  
Enforcement and Regional  
Counsel Division

By:

James A. Sellar  
James A. Sellar  
Chief  
Permits Administration Branch

ENVIRONMENTAL PROTECTION AGENCY

NPDES  
PI- NY

MAY 1 1974

Mr. Eugene F. Seebald  
Director  
Division of Pure Waters  
New York State Department of  
Environmental Conservation  
50 Wolf Road  
Albany, New York 12201

Re: Joint Public Notice Procedure  
for EPA - NYS NPDES Permits

Dear Gene:

Following the lengthy meeting on the joint public notice procedure that Pat Harvey and I had with Ernie Trad, Sal Pagano, Frank Bogadain, Russ Mountpleasant, Harry Bagley and other members of your staff on April 9, 1974, I want to recapitulate how we in the EPA regional office propose that it be carried out. Before doing so, however, let me first discuss our NPDES permit issuance goals and thus provide a better perspective from which to evaluate the need for the time frames we are setting and the measures we are advocating to cut through existing administrative procedures.

Region II is committed to issuing final NPDES permits to all major and other significant industrial dischargers and final or draft permits to all major or other significant municipal dischargers by December 31, 1974. To achieve these goals, we must, by June 30, 1974, have prepared draft permits for approximately 800 significant industrial dischargers and 742 municipal dischargers. We must also have gone to public notice with the great majority of these dischargers, including 307 major industrial dischargers. If we do not achieve this volume of draft permits and public notices by June 30, 1974, we cannot hope to meet our regional commitments for December 31, 1974.

ELYF-mh

CONCURRENCES

NAME	DATE	2 ERC-WE	2 ERC	2 FT					
NAME		<i>fly</i>	<i>ms</i>	<i>fly</i>					
DATE		4/29/74	4/30/74	4/30/74					

PA FORM 1520C

*Retyped - incorrect address*

OFFICIAL FILE COPY



A revised schedule we have submitted to Headquarters EPA for preparing PSTs (draft permits), public notices, and final permits, reflects these goals. Copies of this schedule have been furnished to you. This schedule has been further revised by speeding up the processing of major and significant industrial permits to enable all of them to go to draft permit or public notice by June 30, 1974.

For New York State applicants, we must, by this same date, issue 340 significant discharger permits, including 90 major dischargers; 420 draft permits must go to public notice, including 198 major dischargers; and 483 PSTs or draft permits prepared for significant dischargers, including 198 majors. As of April 1, 1974, for New York dischargers, we have issued 30 final permits, sent 100 draft permits to public notice and sent 139 major discharger draft permits or PSTs to DEC for certification.

As you can see, we still have a great deal of work to do between now and June 30, 1974 and from June 30 to December 31, 1974. We must deal with it on a mass production basis and by applying assembly line techniques. We have instituted such methods in our permit operations. We hope you will do the same in yours.

The size of our joint task and the limited time available for carrying it out do not allow for delays in any of our prescribed assignments. On the contrary, we must eliminate unnecessary steps and speed up processing wherever possible.

One way to gain the additional time we need to assure the successful completion of our task by December 31, 1974 is to place greater reliance on direct telephone communications between our working staff members. Where written communications are necessary, telecopies should be used whenever use of the mail would result in unnecessary delays.

Our joint public notice procedure covering State certification and the draft permit will streamline our processes in accordance with this policy. I am enclosing a copy of the office procedures we have established. We propose to operate in the EPA regional office in accordance with these procedures.

For industrial permits, beginning at once, we will send the applications and requests for certification to DEC accompanied by either a PST or draft permit. We will expect the DEC staff to accomplish its technical review and provide us with its tentative certification within 35 days thereafter. If delivery of the PST or draft permit has been delayed in the mails, the appropriate DEC staff member will telephone his EPA counterpart and obtain an extension of time.

The technical review data and tentative certification should be transmitted to the regional office as soon as available. And especially when time limits are running short, this should be done by phone or telecopy. As soon as we receive the technical review data and tentative certification, we will go to joint public notice on the draft permit and the State certification.

If we have not received the technical review and tentative certification by the 35th day, or at the conclusion of the additional time agreed to between the staff, we will go to public notice only on the draft permit. In that case, we reserve the right to deem certification waived without further notice, should that be necessary to enable us to meet our commitment on permit issuance.

However, any State certification we receive at any time before the final permit is issued, will be seriously considered when we prepare the final permit. Our staff man will discuss it with his DEC counterpart. If there are any unresolved differences, it will be referred to me and I will personally take the matter up with you.

Although we will use the joint public notice for both industrial and municipal permits, the 35 day turnaround time for technical review and tentative certification is intended to apply at this time to industrial permits only. The 60 day time limit for certification following receipt of draft municipal permits will continue to govern, although here too we expect your staff to make every effort to get the technical data and tentative certification to EPA sooner through greater use of the procedures described above.

At our meeting, the members of your staff stated that while they do not agree to commit DEC to the specific 35 day time period



in the joint notice procedure, they will make every effort to meet these time limitations. I told them that their determination to meet the time frame is all-important. So long as we share this mutual determination to achieve the overall goals, I foresee no problem in reaching agreement on necessary adjustments to meet a specific situation in a particular case.

Sincerely yours,

Meyer Scolnick  
Director  
Enforcement and Regional Counsel Division

To Wm J. Thorne Esq.

"Spdes"

Sun Enterprises Ltd

May 20, 1974

N.Y.S. Dept. of Environmental Conservation  
Mr. William L. Garvey, P.E.  
Chief "Spdes" Permit Section  
Div. of Pure Waters  
Room 300  
50 Wolf Road  
Albany, N. Y. 12201

Re: Dept. of Conservation  
NY 5-01- Somers, N.Y.

Dear Sir:

This is to advise you that we are a "Party in Interest" - opposed to the Heritage Hills of Westchester, Rt. 100, Somers, N.Y. - H & H Land Corporation application for discharge of Pollutant Sewage into the "Brown Brook".

We are the owners of a large tract (200 acres) of land south of Rt. 202, Somers, N.Y., and through our property and our wetlands the Brown Brook (F-57D (T)) traverses for a distance of 3000 lineal feet from Route 202 south to a Culvert opposite Rt. 138, along Rt. 100.

The application of H & H Land Corporation (which is owned and controlled by Curtis McCann & Henry Paparazzo) for a permit to discharge sewage wastewater from a proposed Tertiary Secondary Sewer treatment plant via a 16" waste or outfall pipe is hereby opposed by our corporation for the following reasons:

1) The Brown Brook from Rt. 202 south is only an intermediary stream for a 300' distance then this Brown Brook spreads into our 50 acre wetlands that is adjoining our 10 acre spring fed lake (potable water) - 80 million gal. N.Y.S. Police well used as a water supply since 1924, and other wells used for human consumption on our property. The Sun wetlands area again discharge into the continuation of the Brown Brook (south of these wetlands) some 2000 feet south of Rt. 202 where the Brown Brook crosses this Highway into "Sun Property."

The land from Rt. 202 south thru our wetlands and lake area is exceptionally flat (plateau) with only (3) feet of pitch in 3000 lineal feet, therefore, these "Sun" wetlands and this small Brown Brook is not capable of accepting any added water for obvious reasons: the "Sun" wetlands and the Brown Brook cannot



May 20, 1974

Mr. William T. Garvey - 2

handle at the present time the large volumes of water, mud, silt, earth that erodes into this Brown Brook during rainstorms that are draining with great velocity via this Brown Brook from the H. & H. Land Corporation (Heritage) property north of Rt. 202 for a distance of one (1) mile. This is due to the "Heritage" construction of a golf course, grading roads, removal of thousands of trees and disturbing large quantities of earth along both sides of the Brown Brook north of Rt. 202.

The addition of 750,000 gals per day of sewage wastewater as per H & H wastewater Report (McPhee) - every day in the year - derived from subterranean wells by Heritage to the surface then used to treat the sewage human waste in the sewer plant then discharged into the Brown Brook and in the "Sun" wetlands, lake and well water supply area for us to contend with - will destroy our land and our water supply and is confiscation of our property. It would be using our lands as a sewage pollutant water storage (50 acres) surge basin without a license to use our lands and water bodies.

The question of whether this treated pollutant wastewater from the Heritage Sewage treatment plant is clean or is high in nutrients and/or other destructive elements is our primary concern. Another great concern is the flooding by added wastewater from the Sewer Plant and pollution by rainfall erosion from the H & H Land Corp. of Heritage Hills property into the "Sun" lands, water supply and wells through this plateau area of our property. If a break-down of the plant occurs at any time and the pollutants are piped and directed into the "Sun" lands it will destroy and confiscate our lands and water supply areas.

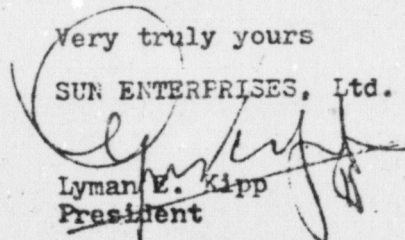
The Sun wetlands, lake areas, and Sun lands cannot be made a septic field, Settling Basin, or surge tank for the use of the Heritage Hills Development, H & H Land Corp., or any other entity for any of the uses proposed by this or any other Permit application.

We trust you will, from the foregoing information, find that there is a need for a Public Hearing on this proposed discharge. We sincerely request a Public Hearing be held in order to have all the testimony produced. Therefore, we are a "Party in Interest" and we are gravely concerned and sincere objectors to the proposed discharge of any sewage pollutant and nutrients into the "Brown Brook" from H & H Land Corporation Building project, Somers, N. Y.

Thanking you for your kind consideration of this request, we are

Very truly yours

SUN ENTERPRISES, Ltd.

  
Lyman E. Kipp  
President

LEK/an  
Certified Mail

All

May 28, 1974

Regional Administration  
U. S. Environmental Protection Agency  
Regent 2  
726 Federal Plaza  
New York, N. Y. 10007

Re: Heritase Hills Condominium Project  
Route 202, Somers, Westchester  
County, New York 10589

Gentlemen:

We take this opportunity to notify you for your investigation and action of a serious condition that would cause irreparable *Continuing* damage to the environment, existing water wells, reservoir, ~~and~~ *and* ~~the~~ *the* public health and welfare of the Town of Somers, N.Y.

This concerns the proposed discharge of 700,000 gallons per day of pollutant sewage wastewater from the "Heritase Hills" Condominium (3200 unit - 6500 people - housing project) Sewer plant being constructed north of Rt. 202 and east of Warren Street, Somers, N. Y., into the intermediary "Trout Stream" known as the Brown Brook (N.Y. State Conservation Designated) and controlled Stream P-57D (T).

We are the owners of more than 500 acres of land south of Rt. 202, opposite Warren Street, Somers, N.Y. and our property is contiguous (down stream) to the south of Heritase Hills Housing Project.

We (Sun Enterprises, Ltd.) own a large 50 acre wetland area and a Spring fed water reservoir of 100 million gallons of pure spring fed water - two excellent wells - one of which is used to supply water to the N.Y.S. Police Station (32 troopers) and to other buildings along Rt. 100, Somers, N.Y.

The Brown Brook flows through our wetland area and adjoins our water reservoir and wells for a distance of 4000 feet from Rt. 202 at Warren Street south to the N.Y. City Fuscoot Reservoir. The nutrients (nitrates, phosphates and detergents) cannot be removed by tertiary treatment of the sewage from this housing development. Therefore, the Heritase Hills owners must not be permitted to discharge (via a 16" effluent outflow pipe) the 700,000 gallons per day of pollutant sewage wastewater into the little Brown Brook at Rt. 202 and Warren St., Somers, N.Y. and then through our water lands that would flood and destroy, with the aforementioned nutrients, our lands and water supply installations.



May 28, 1974

Regional Administration - 2

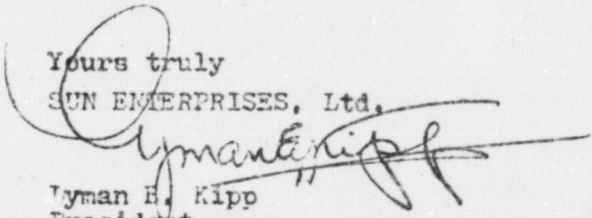
We strongly object to the proposed disposal of Heritage Hills sewage wastewater into our lands via the Brown Brook and sincerely ask that your Federal Agency take action by your power to legally prevent the destruction, by flooding and pollution, of the pure waters on our lands.

We further bring to your attention that this sewer treatment plant (now under construction - May 1974) cannot, as aforementioned, remove the nutrients, etc. which are, in themselves, destructive to our water supply used for human consumption but, in addition, it would be complete destruction of our water supply and land when this man-made sewer plant machine breaks down or becomes inoperative due to mechanical or other failures - that have occurred at other locations - as 6500 condominium residents would not stop using their toilets and all the downstream property would become an open cesspool.

Please proceed to register this notice of protest and then take the necessary steps at your Federal Environmental level to prevent the destruction of these lands and water supply of all the downstream owners along the Brown Brook from this Heritage Hills Sewer plant pollutant discharge as proposed.

We ask that you acknowledge this letter together with a statement as to the action your Federal Administration will take to prevent this proposed destruction and confiscation of a very valuable water supply.

Yours truly  
SUN ENTERPRISES, Ltd.

  
Lyman H. Kipp  
President

LEK/an

Certified Mail  
Return Receipt Requested

cc to Senator William Buckley

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

SUBJECT: H & H Land Corp. - Heritage Hills of Westchester      DATE: June 24, 1974  
NY 0026891

FROM: William J. Muszynski, Chief  
Municipal Permits Section

TO: Richard A. Flye, Chief  
Water Enforcement Branch  
Enforcement and Regional Counsel Division

THRU: David A. Luoma, P.E.  
Acting Director  
Facilities Technology Division

Letters of public interest, requesting a public hearing for the above mentioned project, have been received by this office from:

- a. Lyman E. Kipp
- b. June and Jerry Nardelli
- c. George and Ann Port
- d. Anthony and Rosemary Saia
- e. Mary M. Daly

Based on information supplied by the Applicant and by the State of New York Department of Environmental Conservation (DEC) it has been determined by this office that a public hearing will not be necessary. In response to the questions raised in the letters noted above we offer the following:

- a. Lyman E. Kipp, President, Sun Enterprises, Ltd.

All of Mr. Kipp's questions and objections, which were raised in his letters of May 20 and May 28, 1974, were answered during a public hearing held by the State of New York when the H & H Land Corp. applied for a water supply permit. This stand has also been taken by DEC for these comments.

Mr. Kipp states that his wetlands which lie below the proposed plant site, and the receiving stream, Brown Brook, cannot handle the large volumes of water at the present time and that they will be destroyed by the discharge from the facility. He also raises the question as to whether groundwater from which the people in the area derive their potable water will be adversely affected by the discharge. It was, however, concluded after the public hearing that:



"The quality of the discharge to Brown Brook will not result in any unnecessary or unreasonable degradation of the stream within the meaning of the Rules and Regulations for the Use and Protection of Waters (Part 608, NYCRR) but the Applicants will be required to comply with the applicable provisions of Article 17 of the Environmental Conservation Law and the applicable provisions of the Federal Water Pollution Control Act Amendments of 1972 (PL 92-500).

The quantity of the discharge to Brown Brook will have little or no adverse effect on the stream or to the culverts or other structures across the stream on property downstream of the proposed point of discharge."

The State also found that a ... "proposed dam will create a small pond for aesthetic purposes, provide for control of siltation in the stream channel downstream, provide for controlled release of the storm water runoff captured behind the dam...". "The construction of the dam will have a beneficial effect downstream of the dam during periods of high flow...".

In answer to the question as to whether nutrients will be sufficiently removed to prevent degradation of the stream it should be noted that the Applicant must comply with the effluent limitations in the NPDES permit which, if met, will sufficiently prevent such a problem from resulting due to the facility's discharge.

b. Jerry and June Nardelli

The Nardelli's raise a question as to the location of the plant and discharge pipe. The location of the treatment facility has already been approved by the State of New York and is not under our jurisdiction. As to the degradation of their property, note the public hearing comments above.

c. George and Ann Port

Answers to their questions of plant location and adverse effects of the discharge on their pond, located below the facility, and to Brown Brook are indicated above.

d. Anthony and Rosemary Saia

In answer to the question of whether "Fireman's Pond" will be flooded by the discharge, the proposed dam, noted above, will afford a degree of additional flood control. This pond will not be polluted by the facility's effluent due to required quality of the discharge. In response to their question of objectional odors, such an effluent will not create this condition.

e. Mary M. Daly

The question as to whether the water table will be dangerously lowered has been answered in the public hearing. Claims of a devaluation of neighboring property, not under our jurisdiction, has also been answered satisfactorily by the State as a result of the public hearing. Effects of the discharge on the stream will be negligible as noted above.

In addition, a reply to Mr. Kipp by the NYSDEC concerning his objections to the proposed facility and discharge has been attached.

In view of the above, the draft for the H & H Land Corp., Heritage Hills of Westchester, may be issued as a final permit after incorporating the modifications noted below. To facilitate typing, a blank permit is attached, as well as a corrected copy of the draft.

- a. Add effective and expiration dates of June 28, 1974 and June 28, 1979 respectively to the first page of the permit.
- b. Add general condition A(18) to page 5. (This has already been included on the new page 5 of the blank permit).
- c. Change Table I-A to Table I on page 7.
- d. Substitute the date, July 1, 1974 where indicated on page 9 of the corrected draft permit.
- e. Add permit condition C.3. on page 14. which reads; 3. The permittee shall submit, by September 27, 1974, an Engineering Report describing, in detail, the method with which the permittee proposes to meet all effluent limitations required in the permit. Upon receipt of this information the permit may be revised.
- f. Add the effective and expiration dates of June 28, 1974 and June 28, 1979 respectively to page 15.

If there are any questions please contact Phil Amicone.

cc: ✓James A. Sellar, Chief  
Permits Administration Branch



# ONLY COPY AVAILABLE

MAY 9 1974

Regional Administrator  
Environmental Protection Agency  
Region II  
26 Federal Plaza  
New York, New York 10007

RECEIVED

MAY 31 1974

BRANCH OF RIVER BASINS  
CONCORD AREA OFFICE

Dear Sir:

No action, due to present lack of personnel, is contemplated for the following NPDES applications. At this time no report is anticipated in accordance with provisions of the Fish and Wildlife Coordination Act (48 Stat. 401, as amended; 16 U.S.C. 661 et seq.). Would you please provide to the Division of River Basin Studies, Bureau of Sport Fisheries and Wildlife, 55 Pleasant Street, Concord, N. H. 03301, a copy of all final permits issued for the applications below:

Notice No.	Applicant	Notice Date
NY0000787	Walch Allyn, Inc.	19 Apr. 74
NY0001651	Stauffer Chemical Co.	19 Apr. 74
NY0001767	The Pillsbury Co.	19 Apr. 74
NY0002101	General Electric Co.	19 Apr. 74
NY0002887	General Crushed Stone Company	19 Apr. 74
NY0003263	The Village of Albion	19 Apr. 74
NY0003336	Hooker Chemical Corp.	19 Apr. 74
NY0006114	I.E.M. Corp.	19 Apr. 74
NY0006475	U. S. Steel Corp.	19 Apr. 74
NY0006602	The Pepsi-Cola Schenectady Bottling Co.	19 Apr. 74
NY0001279	BernzOMATIC Corp.	19 Apr. 74
NY0006971	The Union Fork and Hoe Co.	19 Apr. 74
NY0001155	Walch Foods Inc.	19 Apr. 74
NY0001899	Amalgam Specialty Metals Div.	19 Apr. 74
NY0002500	Fisher-Price Toys	19 Apr. 74
NY0002721	O-AT-KA Milk Prod. Coop., Inc.	19 Apr. 74
NY0003140	Concrete Materials, Inc.	19 Apr. 74
NY0003150	Concrete Materials, Inc.	19 Apr. 74
NY0003778	General Electric Co.	19 Apr. 74
NY0004553	Phelps Dodge Cable and Wire Co.	19 Apr. 74
NY0006734	The Bendix Corp.	19 Apr. 74
NY0021296	U. S. Army, Seneca Army Depot	19 Apr. 74
NY0021300	U. S. Army, Seneca Army Depot	19 Apr. 74
NY0021318	U. S. Army, Seneca Army Depot	19 Apr. 74

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- Page 2 -

<u>Notice No.</u>	<u>Applicant</u>	<u>Notice Date</u>
NY0001571	Georgia-Pacific Corp.	19 Apr. 74
NY0020273	NYS Environmental Facilities Corp.	20 Apr. 74
NY0000290	V. H. Annis Dairy, Inc.	26 Apr. 74
NY0001945	American Malting Inc.	26 Apr. 74
NY0002364	Spaulding Fibre Co., Inc.	26 Apr. 74
NY0002399	Somet-Solvay Div., Allied	25 Apr. 74
NY0005840	E. G. Balia & Son Const. Corp.	26 Apr. 74
NY0005939	Republic Steel Corp.	26 Apr. 74
NY0007153	The Windsor Building Supplies Co., Inc.	26 Apr. 74
NY0020397	Village of Corinth	26 Apr. 74
NY0022331	Village of Middleport	30 Apr. 74
NY0022764	Village of North Tarrytown	30 Apr. 74
NY0023175	Village of Briarcliff Manor	30 Apr. 74
NY0023540	Ontario Court, Dept. of Social Services	30 Apr. 74
NY0023612	Village of Macedon	30 Apr. 74
NY0026000	Brighton Sewer District #2	30 Apr. 74
NY0026051	Town of Orangetown	30 Apr. 74
NY0026310	City of Newburgh	30 Apr. 74
NY0026361	Brighton Sewer District #2	30 Apr. 74
NY0026891	Red Land Corp.	30 Apr. 74
NY0000353	Lyndonville Canning Co., Inc.	26 Apr. 74
NY0001660	Warren Bros., Div. of Ashland Oil, Inc.	26 Apr. 74
NY0002178	Allied Chemical Corp.	26 Apr. 74
NY0003018	Village of Albion	26 Apr. 74
NY0003310	Danner-Manna Coke Corp.	26 Apr. 74
NY0006543	Cyprus Wire & Cable Co.	26 Apr. 74
NY0006751	P. R. Mallory & Co., Inc.	26 Apr. 74
NY0006777	Revere Copper and Brass, Inc.	26 Apr. 74
NY0007790	Callahan Industries, Inc.	26 Apr. 74
NY0020257	N.Y.S. Environmental Facilities Corp.	30 Apr. 74
NY0021784	Town of Moriah -	30 Apr. 74
NY0021792	Town of Moriah	30 Apr. 74
NY0022055	Village of Hudson Falls	30 Apr. 74
NY0022071	Town of Goshen Sewer District	30 Apr. 74
NY0022527	We Walker Campsite	30 Apr. 74
NY0022586	Village of Highland Falls	30 Apr. 74
NY0022594	Village of Highland Falls	30 Apr. 74
NY0022969	Village of Port Henry, Inc.	30 Apr. 74
NY0023167	Village of Briarcliff Manor	30 Apr. 74
NY0023281	Village of Tarrytown	30 Apr. 74
NY0023337	Town of Potsdam	30 Apr. 74
NY0023582	Village of Chatham	30 Apr. 74
NY0023663	Argyle Central School District	30 Apr. 74



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- Page 3 -

<u>Notice No.</u>	<u>Applicant</u>	<u>Notice Date</u>
NY0024422	Town of Wallkill	30 Apr. 74
NY0024732	Ashland Chemical Co.	26 Apr. 74
NY0024821	Village of Poosick Falls	30 Apr. 74
NY0025500	Village of East Rochester	30 Apr. 74
NY0025844	Hamburg Master Sewer District	30 Apr. 74
NY0026379	Brighton Sewer District # 5	30 Apr. 74
NY0026443	Village of Montgomery	30 Apr. 74
NY0026735	Town of Yorktown	30 Apr. 74
NY0026916	Ogdensburg Bridge and Port Auth.	30 Apr. 74
NY0026328	City of Middletown	30 Apr. 74
NY0000124	Freezer Queen Foods, Inc.	3 May 74
NY0002050	Moench Tanning Co., Inc.	3 May 74
NY0007021	General Electric Co.	3 May 74
NY0007439	Western Publishing Co.	3 May 74
NY0022462	Inc. Village of Cedarhurst	3 May 74
NY0022560	Town of Penfield	3 May 74
NY0022608	Town of Penfield	3 May 74
NY0004937	Lehigh Portland Cement Co.	10 May 74
NY0022250	IBM Corp.	10 May 74
NY0025551	Town of Queensbury	10 May 74

Sincerely yours,

*William H. Goulding Jr.*  
ACTING Regional Director

TTOliver/cap 5/22/74

CC: CAO

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New York State Department of Environmental Conservation  
Albany, N. Y. 12201

Henry L. Diamond,  
Commissioner

June 12, 1974

Curtis McGann, President  
H and H Land Corporation  
Heritage Hills of Westchester  
Route 100  
Somers, New York 10589

Dear Sir:

We have reviewed your application for a Federal permit to discharge under Section 402, National Pollutant Discharge Elimination System, of the Federal Water Pollution Control Act Amendments of 1972, "the Act" and have been requested by the Environmental Protection Agency to act on the application pursuant to Section 401(a) of the Act.

Based on the foregoing, and that Public Notice was duly given, the Department of Environmental Conservation hereby certifies that the discharge which the H and H Land Corporation - Heritage Hills of Westchester causes from their facility located off Warren Street in the Town of Somers, Westchester County, New York 10589 namely 702,000 gallons per day of treated sewage effluent into Brown Brook

will comply with applicable provisions of Sections 301, 302, 306 and 307 of the Act and the Classifications and Standards Governing the Quality and Purity of Waters of New York State (Title 6 of the Official Compilation Codes, Rules and Regulations of the State of New York), which have been determined to be applicable for the purposes of the Act, provided the following conditions, effluent limitations and other limitations which are hereby set forth as part of this certification as provided under Section 401(d) of the Act are met and become conditions on any Federal permit or license subject to the provisions of this Section, and are not exceeded in such permit:

Effluent Limitations

Flow	30 day arithmetic mean	0.702 mgd
BOD	Daily arithmetic mean	29.0 #/day
SS	Daily arithmetic mean	29.0 #/day
Fecal Coliform	30 day geometric mean	200/100 ml
	7 day geometric mean	400/100 ml

A20

EXHIBIT T



Curtis McGann  
Page 2  
June 12, 1974

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Effluent Limitations (con't.)

pH	Range	6.0 to 9.0
D.O.	Minimum daily arithmetic mean	41 #/day
Ammonia	Daily arithmetic mean	12 #/day
Settleable solids	Daily arithmetic mean	0.1 ml/l
Residual chlorine	Daily arithmetic mean	$\geq$ 3.0 #/day
Phosphorous	Daily arithmetic mean	3.0 #/day

Monitoring Requirements

<u>Parameter</u>	<u>Frequency</u>	<u>Sample Type</u>
Total Flow, mgd	Continuous	---
BOD <sub>5</sub> , mg/l	1/week	6 hr. composite
Settleable solids, ml/l	1/day	Grab
Suspended solids, mg/l	1/week	6 hr. composite
pH	1/day	Grab
Residual chlorine, mg/l	1/day	Grab
Phosphorous	1/week	6 hr. composite
Fecal coliform, N per 100 ml	1/week	Grab
Temperature, °C	1/day	---
D.O.	1/week	Grab
Ammonia	1/week	6 hr. composite

A copy of this certification is being forwarded to the Region II Office of the U.S. Environmental Protection Agency as their notification of this action.

Very truly yours,

*William L. Garvey*

William L. Garvey, P.E.  
Chief, P.D.E.S. Permit Section  
Division of Pure Waters

cc: Ken Stevens  
Mr. Harrison, Region 3  
EPA Region II  
File 4---

New York State Department of Environmental Conservation  
50 Wolf Road, Albany, New York 12201



James L. Biggane,  
Commissioner

June 10, 1974

Mr. Lyman Kipp  
Sun Enterprises, Ltd.  
Route 100  
Somers, New York 10589

Re: STATE CERTIFICATION  
NPDES APPLICATION NO. NY-0026891  
HERITAGE HILLS OF WESTCHESTER  
SOMERS (T), WESTCHESTER COUNTY

Dear Mr. Kipp:

The following is in response to your letter of May 20, 1974, regarding the above referenced NPDES application and associated certification of State water quality standards.

As you are well aware, the applicant, H & H Land Corporation, proposes to discharge treated sanitary wastes into the Brown Brook at a rate of approximately 700,000 gallons per day. At the direction of this Department, the applicant was required to design his treatment process to provide a final effluent that would be compatible with an intermittent stream. This very high degree of treatment produces a final effluent which is self supporting; that is, it produces an effluent which could constitute the only flow in a stream and result in no objectionable nuisances. In most instances, the effluent from a treatment plant designed to these standards is actually clearer than the natural water into which it is being discharged. This was pointed out by the applicant's engineer during testimony presented during the public hearings conducted during September and October of 1973 for the water supply application for the proposed development. In testimony presented at these hearings, Mr. Calvin Weber of the Westchester County Health Department stated that there should be no adverse affect on water quality downstream resulting from the treated effluent. Thus, from testimony presented at those hearings, it would appear that there should be no adverse affect on water quality or on land use resulting from water quality downstream from the proposed discharge. This would include the wetlands of Sun Enterprises which you mentioned in your letter.

A22

EXHIBIT Q



Mr. Lyman Kipp

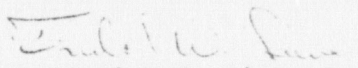
-2-

June 10, 1974

As to the affect of the increased quantity of water flowing in Brown Brook as a result of the proposed discharge, testimony was introduced at the above mentioned hearings by Mr. McPhee, indicating that an increase in water surface elevation of 0.017 feet could be anticipated in the wetlands of Sun Enterprises.

It is our opinion that the rather extensive and comprehensive hearings conducted during the fall of last year regarding the proposed development sufficiently answered all questions presented at that time and that the comments that we have received to this date on this application are basically a restatement of questions posed at that time. Therefore, we are not scheduling a hearing on the subject certification.

Very truly yours,

  
Frederick W. Sievers, P.E.  
Senior Sanitary Engineer

For: William L. Garvey, P.E.  
Chief, PDES Permit Section  
Division of Pure Waters

*File Copy*

June 26, 1974

*"Sun" E.H.H.  
2/100*

New York State Department of  
Environmental Conservation  
50 Wolf Road  
Albany, New York 12201

Attention: Mr. Frederick W. Sievers, P.E.

Re: N.P.D.E.S.  
Application #N.Y.0026891  
Heritage Hills of Westchester  
Somers, N. Y.

Gentlemen:

We are in receipt of your letter dated June 10, 1974 regarding your decision not to schedule a hearing in the above captioned matter that we have so earnestly requested during the past year and as recently as our May 20, 1974 letter to your Department.

We know that we are wasting our time with this communication as it is very evident by your decision that your entire Department concluded that our objections are unfounded and not worthy of the hearing we requested in order to preserve our land and water supply areas south of Rt. 202, Somers, N. Y.

For the records, we must as taxpayers and citizens answer your June 10, 1974 letter to us, and bring to your attention various pertinent facts concerning this Heritage Hills application for discharge of effluent sewage wastewater into our property (wetlands) and the "Brown Brook" south of Rt. 202, Somers, N. Y.

(1) The H & H Land Corporation as stated in the 2nd paragraph of your letter intend to discharge 700,000 gallons per day of treated sewage from this development as pointed out by Mr. McPhee, the H&H Land Co. Engineer, but the engineer and the applicant did not project or evaluate the destruction that would occur to "Sun" property along "Brown Brook" when the man made machine or treatment plant has a breakdown or needs parts that require weeks of waiting to obtain and install. See letter attached.

The applicant through their engineer, Mr. McPhee, did admit and calculate incorrectly by minimizing the increase in water surface elevation over the "Sun" wetland property (many acres) thereby admitting flooding and use of "Sun" land without license or approval of owners. The Brown Brook ceases to be a brook when it enters "Sun" property south of Rt. 202 and becomes a wildlife wetland, water bearing area.

A24

EXHIBIT U(1)



June 26, 1974

N.Y.S. Dept. of Environmental Conservation - 2

The State of New York and the Environmental Conservation Department has no right to allow anyone to use our lands for a septic field or flood plain or leeching field. The sub-surface water from wells used to treat HCH sewage should not be discharged on Sun property to flood same (365 days every year).

The Sixty-Four dollar question for you to think over and answer is - why was the 16" sewer exhaust pipe installed 1000 feet south of sewer treatment plant and then discharged south of Rt. 202 into Sun lands? Question: Was the reason that should the sewer plant break down mechanically the Heritage Hills developers did not want the effluent sewage discharged near their Condo's and residents on their land into the "Brown" Brook in the event of failure of plant?

This ruling to have no hearings by your department is ridiculous and your statement regarding the hearings in the Fall of 1973 by your Mr. Dickinson needs clarification and additional checking with new information in order to determine why one owner can exhaust sewage on lands of another owner.

Please acknowledge this latter as soon as possible.

Very truly yours

SUN ENTERPRISES, Ltd.

Lyman E. Nipp  
President

IEK/an

Certified Mail  
Return Receipt requested

cc to Mr. James L. Biggane, Commissioner

cc Mr. William L. Garvey, P.E.

cc Mr. Calvin Weber, F.R. Westchester Dept. of Health, White Plains, N.Y.

cc Hon. Albert DelBello, County Executive, White Plains, N.Y.

Copy of Southbury Dept. of Health Memo attached to each letter.

A25

New York State Department of Environmental Conservation  
50 Wolf Road, Albany, New York 12201



Henry L. Diamond,  
Commissioner

August 5, 1974

Mr. Lyman Kipp  
Sun Enterprises LTD.  
Route 100  
Somers, New York 10589

Re: NPDES APPLICATION NO. NY-0026891  
HERITAGE HILLS OF WESTCHESTER  
SOMERS (T), WESTCHESTER COUNTY

Dear Mr. Kipp:

The following is in response to your letter of June 26, 1974,  
regarding the above referenced NPDES Application.

First, I would like to respond to one of your opening remarks which incorrectly states this Department's position. We do not feel that your objections were unfounded nor that they were unworthy of a hearing. In fact, last Fall a rather lengthy hearing was conducted by this Department on the proposed project, at which time your objections were amply presented; and, in our opinion, satisfactorily answered. It is our position that any new hearings on the proposed project would result in a rehashing of points covered last year. In our opinion, this would be wasteful and unwarranted. As to the specific points mentioned in your letter, I offer the following for your consideration.

There is a possibility that something could happen which would result in the effluent from the proposed treatment plant not complying with the effluent limitations established in the Permit. To protect any potentially affected parties, General Condition #11 of the NPDES Permit states "Except as provided in permit condition 8 on bypassing, nothing in this permit shall be construed to relieve the permittee from civil or criminal penalties for non-compliance, whether or not such non-compliance is due to factors beyond his control, such as equipment breakdown, electric power failure, accident, or natural disaster". From this, it would appear to be advantageous for the developer to provide a treatment facility with enough safety features to substantially reduce the possibility of a discharge exceeding the permit limitations.

A26



Mr. Lyman Kipp

-2-

August 5, 1974

The applicants engineer, Mr. McPhee, presented data, at last Fall's hearings, indicating that the increase in water elevation in the Sun wetlands due to the discharge from the proposed project was negligible. We have received no engineering computation that would indicate otherwise. Therefore, we are obliged to accept Mr. McPhee's testimony as a competent Licensed Professional Engineer. //

In selecting the site of the discharge into the Brown Brook, the applicant hired a biological consultant who determined that the location at Route 202 would be the best location from the standpoint of the local environment. //

I trust that the above information will be helpful to you.

Very truly yours,

Frederick W. Sievers, P.E.  
Senior Sanitary Engineer

For: William L. Garvey, P.E.  
Chief, PDES Permit Section  
Division of Pure Waters

New York State Department of Environmental Conservation  
50 Wolf Road, Albany, New York 12201



Henry L. Diamond,  
Commissioner

September 3, 1974

Mr. Lyman E. Kipp  
Sun Enterprises, Ltd.  
Route 100  
Somers, New York 10589

Re: H and H Land Corporation  
Somers, Westchester County  
NY 0026891

Dear Mr. Kipp:

Thank you for your letter regarding the application of H and H Land Corporation - Heritage Hills of Westchester, Route 100, Somers, New York 10589 for a Federal permit to discharge, under the National Pollutant Discharge Elimination System, into Brown Brook from their facility off Warren Street in the Town of Somers, New York 10589 and the need for State certification, as provided by Section 401 of the Federal Water Pollution Control Act Amendments of 1972, to obtain such a permit.

This Department has reviewed and commented on preliminary technical determinations regarding the discharge as developed by the U.S. Environmental Protection Agency and has granted certification setting forth the effluent limitations and conditions deemed necessary to assure compliance with State water quality standards and all applicable provisions of State law.

An actual draft permit on the application was the subject of public notice procedures by the Region II Office of the U.S. Environmental Protection Agency and such set forth technical determinations and limitations concerning the permitting of the discharge. The State certified limitations and conditions were for the most part provided for in the final NPDES permit (NY 0026891) issued by EPA on July 9, 1974. The conditions and effluent limitations contained in our certification for this discharge are attached.

Once again thanking you for your interest, I remain

Very truly yours,

William L. Garvey, P.E.  
Chief, P.D.E.S. Permit Section  
Division of Pure Waters

cc: Mr. Harrison, Region 3

A28



copy

A circular ink stamp from the U.S. District Court, Southern District of New York. The text "U.S. DISTRICT COURT" is curved along the top inner edge, "FILED" is in the center, "MAY 9 1975" is below it, and "S. D. OF N. Y." is curved along the bottom inner edge.

73 Civ. 68

#42395

Defendants.

Appearances:

HON. PAUL J. CURRAN,  
United States Attorney for the  
Southern District of New York  
Attorney for Defendants Train, Hansler, Morton,  
and United States of America  
WILLIAM ROSE BROOKER, ESQ.,  
Assistant United States Attorney  
RICHARD C. TISCH, ESQ.,  
Attorney, Water Enforcement Branch,,  
Environmental Protection Administration  
Of Counsel

HON. HOLIS J. LEEKOWITZ,  
 Attorney General of the State of New York  
 Attorney for Defendants Reid, McKeon, Conner, Garvey,  
 Schuler, Sinacori, Gardeski, and State of New York  
 OLIN HARPER LOCOSTE, ESQ.  
 STANLEY FISHMAN, ESQ.  
 JULIUS WEINGARTIN, ESQ.  
 Of Counsel

(Appearances continue)

HENRY H. CHAMBERS, ESQ.,  
Town Attorney, Town of Somers,  
50 East 42nd St., New York, N.Y. 10017  
Attorney for Defendants Town of Somers; Adams, Minogue,  
Oehler, Osborne, each as Councilman of the Town Board  
of the Town of Somers; Quagliano, Gross, Feldschuh,  
Fogarty, La Porte, Lubkeman, Muccio, each as member  
of the Zoning Board of Appeals of the Town of Somers;  
Fleischhauer, Albertson, Brown, Cukierski, Granata,  
Kolack, Peer, each as member of the Planning Board of  
the Town of Somers; Antonaccio; Marconi; and Flood

BLASI and ZIMMERMAN, ESQ.  
360 South Broadway, Tarrytown, N. Y. 10591  
Attorneys for Defendants Heritage Hills of Westchester,  
Paparazzo, McGann, H & I Land Corp., Heritage Hills  
Sewage-Works Corporation, and Heritage Development  
Group, Inc.

PETER F. BLASI, ESQ.  
DAVIS M. ZIMMERMAN, ESQ.  
Of Counsel

ANGUS MACBETH, ESQ.  
15 W. 44th St., New York, N.Y. 10036  
Attorney for Amicus Curiae Natural Resources  
Defense Council

#### O P I N I O N

BONSAL, D. J.

Plaintiffs commenced this action against certain federal,  
state, and town officials and certain private defendants on  
January 8, 1975. The federal and state defendants moved pursuant  
to F.R.Civ.P. 12(b) to dismiss the complaint. The town and private  
defendants moved pursuant to F.R.Civ.P. 12(b) to dismiss the com-  
plaint and for summary judgment pursuant to F.R.Civ.P. 56. Plain-  
tiffs moved for summary judgment on their "second claim for relief."  
After these motions became sub judice, plaintiffs, on April 21,  
1975, filed an amended complaint as a matter of course pursuant to



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D.Civ.P. 12(a), since no responsive pleadings had been served. The foregoing motions will therefore be treated as applying with equal force to the amended complaint.

#### PLAINTIFFS

According to the amended complaint, plaintiff Sun Enterprises, Inc. ("Sun") "is the owner of over 500 acres of land in the Town of Somers [New York] ... including a 40-acre fresh-water wetland containing a spring-fed lake of some 10 acres, two ponds, most of an extensive marsh known locally as No Bottom Marsh ... and approximately 1,000 feet of land along a stream known locally as Brown Brook ... which empties into the Muscoot Reservoir on the Croton River, a tributary of the Hudson River ...." Plaintiff Iwan Ripp is the president of Sun. Plaintiff Southern New York Fish and Game Association, Inc. ("Southern New York") is described in the amended complaint as a not-for-profit membership corporation which has approximately 2,500 members, "many of whom live in and around the Town of Somers and use and enjoy the natural resources of the Sun property." The amended complaint states that the purposes of Southern New York "are to promote the sports of fishing and hunting, to aid in enforcement of laws for the protection of wildlife, to cooperate with private owners to protect natural resources and to educate the public in the need for conservation and protection of wildlife." Plaintiff Richard Homan is described as the "Second Vice President of Southern New York" and "lives above his bait and tackle shop, which is rented from Sun."

#### FEDERAL DEFENDANTS

The federal defendants are Russell Train, Administrator of the United States Environmental Protection Agency ("EPA"); Gerald Hansler, Regional Administrator of EPA for Region II, which includes the state of New York; Rogers Morton, Secretary of the Interior; and the United States of America.

#### STATE DEFENDANTS

The state defendants are Ogden Reid, who replaced James Biggane as Commissioner of the New York State Department of Environmental Conservation ("DEC"); Warren McKeon, Director of Region III of DEC; Louis Condra, Jr., Central Permit Agent for DEC; William Garvey, Chief, Pollution Discharge Elimination System Permit Section, Division of Pure Waters, DEC; Raymond Schuler, New York State Commissioner of Transportation; M. N. Sinacori, Director of Region VIII of the New York State Department of Transportation ("DOT"); Raymond Gardeski, a traffic engineer for DOT; and the State of New York.

#### TOWN DEFENDANTS

The town defendants include the Town of Somers, New York; the councilmen of the Town Board of Somers; the members of the Zoning Board of Appeals of the Town of Somers; the members of the Planning Board of the Town of Somers; and the Town of Somers' Building Inspector, Engineer, and Highway Superintendent.



PRIVATE DEFENDANTS

Defendant Heritage Hills of Westchester (HHW") is described in the amended complaint as a partnership whose partners include defendants Paparazzo and McGann. HHW is developing an adult condominium community in the Town of Somers known as Heritage Hills of Westchester ("Heritage Hills"), purportedly on over 300 acres of land, "including an extensive portion of Brown Brook's streambed," upstream from the Sun property. According to the amended complaint, defendant H & H Land Corp. is a New York corporation which holds title to the property on which Heritage Hills is being developed. Defendant Heritage Hills Sewage-Works Corporation ("Sewage-Works Corporation") is stated to be a corporation organized and existing under the New York State Transportation Corporation Law. Defendant Heritage Development Group, Inc. is allegedly a Connecticut corporation which exercises "general responsibility, supervision and control for the development of" Heritage Hills.

Plaintiffs assert seventeen separate "claims for relief" arising from injury which they allegedly have, are, and will suffer in connection with the development of Heritage Hills and the discharge of sewage treatment effluent from Heritage Hills into Brown Brook. Plaintiffs seek declaratory, injunctive, and monetary relief.

FEDERAL DEFENDANTS' MOTION TO DISMISS AND PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Four separate "claims for relief" are pleaded against

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the federal defendants. Plaintiffs' "first claim for relief" (pars. 32-50) alleges that in connection with the issuance of a National Pollutant Discharge Elimination System ("NPDES") permit to "H&H Land Corporation - Heritage Hills of Westchester" for discharge of sewage treatment effluent into Brown Brook, defendants Train and Mansler violated plaintiffs' rights to due process "by failing to implement the EPA regulations for protecting wetlands and by failing to give plaintiffs adequate notice or the opportunity to comment or the opportunity to request a hearing and by violating applicable law on state certification." In addition, plaintiffs have amended their "first claim for relief" to allege that the federal and state defendants also violated section 302 of the Federal Water Pollution Control Act Amendments of 1972 ("Water Act"), 33 U.S.C. §1312, in connection with the issuance of the NPDES permit to "H&H Land Corporation-Heritage Hills of Westchester."

Plaintiffs' "second claim for relief" (pars. 51-56) charges that defendants Train, Mansler, and Morton violated their duty under the Fish and Wildlife Coordination Act, 16 U.S.C. §661 et seq. and plaintiffs' rights to due process by failing to consult each other with respect to the impact on the fish and wildlife on the Sun Property from the NPDES permit sought by "H&H Land Corp. - Heritage Hills of Westchester." Plaintiffs allege in their "fourth claim for relief" (pars. 64-67) that defendant Morton "negligently or wilfully" failed in his duties under 16 U.S.C. §666 and under the Migratory Bird Treaty Act, 16 U.S.C. §703 et seq. "to prevent the acts of the private defendants, abetted by the State and Town



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defendants" which endanger the American bald eagle and "which endanger and kill migratory birds, their nests and eggs in Brown Brook and No Bottom Marsh." Finally, plaintiffs' "fifth claim for relief" (para. 6b-70) alleges that the issuance of the NPDES permit constitutes a taking of property without just compensation in violation of the Fifth Amendment to the United States Constitution.

First and Fifth "Claims for Relief"

Plaintiffs' first and fifth "claims for relief" pertain directly to the action of the EPA Administrator in issuing an NPDES permit pursuant to section 402 of the Water Act, 33 U.S.C. §1342. Section 509(b)(1) of the Water Act, 33 U.S.C. §1369(b)(1), provides in relevant part:

"Review of the Administrator's action ... in issuing or denying any permit under section 402, may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts such business upon application of any such person."

Plaintiffs are therefore pursuing their first and fifth claims in a forum other than the one designated by Congress. However, "where, as here, Congress has specifically designated a forum for judicial review of administrative action and does so in unmistakable terms except under extraordinary conditions, that forum is exclusive."

Anaconda Co. v. Ruckelshaus, 482 F.2d 1301, 1304-1305 (10th Cir. 1973). See also Getty Oil Co. v. Ruckelshaus, 467 F.2d 349 (3d Cir. 1972), cert. denied, 409 U.S. 1125 (1973); Mader v. Volpe, 466 F.2d 261 (D.C. Cir. 1972); E. I. DuPont de Nemours and Co. v. Train,

383 F.Supp. 1244 (W.D.Va. 1974); American Paper Institute v. Train, 381 F.Supp. 883 (D.D.C. 1974); Arizona Public Service Co. v. Fri, 3 ELR 20894 (D. Ariz. 1973). The amended complaint fails to show such extraordinary conditions as would justify intrusion upon the Congressionally designated function of the Court of Appeals.

Plaintiffs have amended their complaint to assert jurisdiction under the citizen suit provisions of section 505 of the Water Act, 33 U.S.C. §1365, which provides in relevant part:

"(a) Except as provided in subsection (b) of this section, any citizen may commence a civil action on his own behalf--

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this Act or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this Act which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 309(d) of this Act."

Section 505(f), 33 U.S.C. §1365(f), provides that for the purposes of section 505 "the term 'effluent standard or limitation under this Act' means (1) effective July 1, 1973, an unlawful act under subsection (a) of section 301 of this Act; (2) an effluent limitation or other limitation under section 301 or 302 of this Act; (3) standard of performance under section 306 of this Act; (4) prohibition, effluent standard or pretreatment standards under section 307 of



this Act; (5) certification under section 401 of this Act; or (6) a permit or condition thereof issued under section 402 of this Act, which is in effect under this Act (including a requirement applicable by reason of section 313 of this Act)."

Plaintiffs seem to be alleging that the federal and state defendants are in "violation of the effluent limitations set forth in §302(a) of the Water Act, 33 U.S.C. 1312(a)." Section 302(a) provides:

"Whenever, in the judgment of the Administrator, discharges of pollutants from a point source or group of point sources, with the application of effluent limitations required under section 301(b)(2) of this Act, would interfere with the attainment or maintenance of that water quality in a specific portion of the navigable waters which shall assure protection of public water supplies, agricultural and industrial uses, and the protection and propagation of a balanced population of shellfish, fish and wildlife, and allow recreational activities in and on the water, effluent limitations (including alternative effluent control strategies) for such point source or sources shall be established which can reasonably be expected to contribute to the attainment or maintenance of such water quality."

The term "effluent limitation" is defined in section 302(11), 33 U.S.C. §1362(11), as "any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance." Since the only effluent limitations alleged in the amended complaint are those specified by the federal and state defendants in connection with the H & H Land Corporation NPDES permit itself, the Court fails to see how the federal and state defendants can

themselves be in violation of the effluent limitations for the purposes of suit under section 505. Insofar as plaintiffs may be seeking review of the action of the EPA Administrator in approving or promulgating the alleged effluent limitations, section 509(b)(1)(E), 33 U.S.C. §1369(b)(1)(E), designates the Court of Appeals as the appropriate forum. Although section 505(a) authorizes suit against any person "alleged to be in violation of ... certification under section 401," neither the federal nor state defendants could be said to be in violation within the meaning of section 505(a) of the state certification allegedly made here. Review of the action of the state defendants in rendering a certification pursuant to section 401 is not, at least in this case, within the jurisdiction of this Court for the reasons set forth at pp. 19-20 *infra*.

Finally, section 505(a)(2) which gives the district courts jurisdiction to entertain a citizen suit against the Administrator for failure to perform a nondiscretionary duty does not apply to a case such as this one where the allegations of the amended complaint indicate not a failure of the Administrator to act, but a challenge to the action of the Administrator in issuing an NPDES permit. Congress has specified in section 509 that review of the action of the Administrator in issuing an NPDES permit may be had in the Court of Appeals. (Cf. Anaconda Co. v. Ruckelshaus, *supra*, 482 F.2d at 1304 and Arizona Public Service Co. v. Fri, *supra*, which construed citizen suit and judicial review provisions of the Clean Air Act, 42 U.S.C. §§ 1857h-2, 1857h-3, analogous to those of sections 505 and 509 of the Water Act.)



The motion of the federal defendant to dismiss the complaint is granted as to plaintiffs' first and fifth "claims for relief."

"Second Claim for Relief"

Plaintiffs move for summary judgment on their "second claim for relief," which alleges that defendants Train, Hansler, and Morton violated their duty under the Fish and Wildlife Coordination Act ("Coordination Act"), 16 U.S.C. 5661 et seq., "by failing to consult each other with respect to the impact on the fish and wildlife on the Sun Property from the NPDES permit sought by 'H&H Land Corp. - Heritage Hills of Westchester.'" 16 U.S.C. §562(a) provides in relevant part:

"[w]henver the waters of any stream or other body of water are proposed or authorized to be ... modified for any purpose whatever ... by any department or agency of the United States, or by any public or private agency under Federal permit or license, such department or agency first shall consult with the United States Fish and Wildlife Service, Department of the Interior ... with a view to the conservation of wildlife resources by preventing loss of and damage to such resources as well as providing for the development and improvement thereof in connection with such water-resource development."

The following facts are undisputed. On December 27, 1973, the Region II office of EPA received an application for an NPDES permit from "H&H Land Corp. - Heritage Hills of Westchester." On or about April 30, 1974, the Region II office sent to the United States Department of the Interior ("Interior"), Fish and Wildlife Service, Concord Area Office, the public notice, fact sheet, and tentative determinations on the H&H Land Corporation application

for an NPDES permit. On or about May 31, 1974, EPA received a letter dated May 29, 1974 from the Concord Area Office stating, "No action, due to present lack of personnel, is contemplated for the following NPDES applications." Among the 87 applications listed was H&H Land Corporation. On July 12, 1974 an NPDES permit was issued to "H&H Land Corporation - Heritage Hills of Westchester."

After enactment of the Water Act there was disagreement between EPA and Interior as to the applicability of the Coordination Act to NPDES permits. See Protecting America's Estuaries: Florida, Hearings Before a Subcomm. of the House Comm. on Government Operations, 93d Cong., 1st Sess., Appendix 4, Part C, at 1261 (1973). (hereinafter cited as Hearings). The matter was apparently resolved within the Executive branch in favor of applicability. See Hearings, at 1342. Since neither the plaintiffs nor the federal defendants disputes the applicability of the Coordination Act to NPDES permits, the Court expressly refrains from deciding that issue and assumes for the purposes of plaintiffs' motion for summary judgment that the Coordination Act is applicable to NPDES permits.

The main challenge raised by plaintiffs' "second claim for relief" is not to EPA's compliance with the Coordination Act, but to Interior's failure to discharge its alleged duties when by letter dated May 29, 1974 the Fish and Wildlife Service informed EPA that no action would be taken on the H&H Land Corporation application due to lack of personnel. In raising such a challenge, plaintiffs seek to invalidate the NPDES permit issued to the private defendants; to remand the NPDES application to EPA "to permit



Interior to consult with EPA and to afford the plaintiffs an opportunity to present their expert testimony to the EPA," and to enjoin use of the Heritage Hills sewage effluent discharge pipe. Plaintiffs' Memorandum of Law in Support of their Motion for Summary Judgment, at 18. Nevertheless, the cases cited by plaintiffs generally involve suits against government agencies which allegedly have either failed to consult with Interior or have failed to take Interior's recommendations into account. See e.g., Udall v. Federal Power Commission, 387 U.S. 420 (1967); Environmental Defense Fund v. Froehke, 473 F.2d 346 (8th Cir. 1972); Akers v. Resor, 339 F.Supp. 1375 (W.D.Tenn. 1972). The Court has not found any cases dealing with Interior's obligations under the Coordination Act, or any cases which involve a private party's invocation of the Coordination Act to invalidate a government permit issued to another private party, particularly where, as here, substantial funds have been expended in reliance on the validity of the permit.

Shortly after the decision of the various agencies of the Executive branch that the Coordination Act was applicable to NPDES permits, it appears that there were approximately 30,000 pending applications for NPDES permits. See Hearings, at 1363. Counsel for the federal defendants informs the Court that as of July 1974 Interior was faced with a referral backlog of 50,000 applications for NPDES permits with 20,000 additional applications being referred annually. Federal Defendants' Memorandum of Law in Support of their Motion to Dismiss the Complaint, at 22. Apparently in view of the fact that Interior was without funds or personnel adequate to deal

with the workload, consideration was given to allowing Interior to waive its right to receive NPDES permit applications. See 38 Fed. Reg. 13528, 13532-13533 (1973). However, Congressional concern with such a waiver, see Hearings, at 1347-1349, prompted Interior to adopt a policy by which it would prepare reports on all permit applications. These reports would document Interior's position by stating (1) that Interior has no objection to issuance, (2) that Interior recommends denial or modification, or (3) that no action will be taken due to lack of personnel, funds, or technical knowledge. See Hearings, at 1354-1355. Proposed guidelines for selecting those permit applications which will receive detailed consideration were announced in August 1974. See 39 Fed. Reg. 29552 (1974).

In enacting and amending the Coordination Act, Congress expressed its concern that fish and wildlife conservation be taken into account in connection with water-resource development. See S. Rep. No. 1981, 85th Cong., 2d Sess., 2 U.S. Cong. & Admin. News 3446-3451 (1958). To this end Congress placed upon any department or agency of the United States or any public or private agency under federal permit or license which proposes to "modify" any stream or other body of water, an obligation to consult with Interior. EPA complied with this obligation when on April 30, 1974, it sent to Interior the public notice, fact sheet, and tentative determinations on the HAN Land Corporation application for an NPDES permit. Although 16 U.S.C. 5662(b) refers to "reports and recommendations" of Interior, there is no express language which requires Interior to respond substantively on every referral. Implicit in the absence of such manda-



tory language is a grant of discretion to Interior as to how best to utilize its personnel and resources to achieve the Act's purposes of fish and wildlife conservation. In view of the fact that EPA was already required by the Water Act, see e.g. 33 U.S.C. §§ 1251, 1312, 1342, to consider and to protect fish and wildlife in determining whether to issue an NPDES permit, the Court cannot say that Interior abused its discretion and thereby violated the Coordination Act by reporting to EPA that due to lack of personnel it would take no action on the H&H Land Corporation application for an NPDES permit. Moreover, any claim that the NPDES permit is invalid because it was issued without substantive comment from Interior relates to the action of the Administrator in issuing the NPDES permit and must be presented to the Court of Appeals pursuant to section 509 of the Water Act. See pp. 7-8, supra.

Plaintiffs' motion for summary judgment is therefore denied. Although the federal defendants have not moved for summary judgment, the undisputed facts establish their entitlement to it. In exercise of the Court's power to grant summary judgment against the moving party and in favor of a non-moving party, see 6 J. Moore, Federal Practice ¶56.12 (2d ed. 1974), summary judgment will be entered in favor of the federal defendants dismissing the "second claim for relief."

#### "Fourth Claim for Relief"

Plaintiffs' "fourth claim for relief" alleges that defendant Morton "negligently or wilfully" failed in his duties under 16 U.S.C. §668, which sets forth criminal and civil penalties

for persons who commit certain prohibited acts in connection with bald and golden eagles, and under the Migratory Bird Treaty Act ("Treaty Act"), 16 U.S.C. §703 et seq. Section 703 makes it unlawful to take, kill, or possess certain migratory birds. Plaintiffs seek to compel Morton to perform his alleged duties by way of mandamus and assert jurisdiction under 28 U.S.C. §1361 which provides:

"The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."

Plaintiffs do not allege that they ever brought the private defendants' purported violations of 16 U.S.C. §668 and the Treaty Act to Morton's attention. Moreover, although relief by way of mandamus may be appropriate where an official has failed to comply with a specific statutory direction or where official conduct has far exceeded any rational exercise of discretion, Leonhard v. Mitchell, 473 F.2d 709 (2d Cir.), cert. denied, 412 U.S. 949 (1973), plaintiffs have cited no specific statutory direction with which Morton has failed to comply and have alleged no facts which suggest that Morton's conduct has far exceeded any rational exercise of discretion. Since there appears no basis for jurisdiction under 28 U.S.C. §1361, the motion of the federal defendants to dismiss the amended complaint is granted as to the "fourth claim for relief."



Five "claims for relief" are pleaded against the state defendants. Plaintiffs' "sixth claim for relief" (para. 71-75) charges that Biggane, McKeon, and Garvey "negligently or wilfully failed in their duties under Section 401 of the Water Act to make a timely determination of whether or not to hear new expert testimony for Sun and Kipp on the certification or to hear such testimony and also to make a timely and complete certification that the discharge sought by 'Mid Land Corp. - Heritage Hills of Westchester' will comply with applicable provisions of the Water Act." The "seventh claim for relief" (para. 76-82) alleges that Biggane, McKeon, and Condra "negligently or wilfully" failed to enforce the conditions of a stream protection permit issued pursuant to Article 13, Title 5 of the New York Environmental Conservation Law and that even if the conditions of the stream protection permit were met, Biggane, McKeon, and Condra violated due process in approving the permit because the prerequisites of C.N.Y.C.R.R. §603.6 were not established. Plaintiffs' "eighth claim for relief" (para. 83-88) asserts that Biggane, McKeon, Condra, and Garvey "wilfully and knowingly" declined to investigate factual complaints by Sun and Kipp; denied "Sun and Kipp timely notice of the DEC certification for the NPDES permit prior to such certification and concealed the fact of certification or issuance of the NPDES permit from them for two months;" and "declined to exercise their authority under applicable law to protect plaintiffs and their interests although they did accommodate the private defendants herein by issuing the

permits and certification sought by various of the private defendants." In their "ninth claim for relief" (pars. 89-99), plaintiffs charge that Schular, Sinacori, and Gardeski violated state law in issuing a highway work permit which allowed the laying of a sewer pipe for Heritage Hills, and that since these defendants caused state property to be used as a discharge point for sewage treatment effluent from Heritage Hills, "the State is jointly and severally liable with the private defendants" for damage caused to plaintiffs. Plaintiffs' "tenth claim for relief" (pars. 100-102) alleges that the state's certification for the NPDES permit, and the issuance of the stream protection permit and the highway work permit, resulted in a substantial taking of property without compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution. As against the state defendants, plaintiffs pray for judgment declaring the state issued permits null and void, and enjoining their use, and alternatively an award to Sun of the value of its property lost.

Insofar as plaintiffs seek retroactive injunctive relief and a monetary award against the state defendants, substantial issues concerning state immunity under the Eleventh Amendment may be presented. See Edelman v. Jordan, 415 U.S. 651 (1974). However, it is unnecessary to reach those issues because regardless of possible immunity under the Eleventh Amendment, this Court does not have subject matter jurisdiction to entertain plaintiffs' claims against the state defendants.

Plaintiffs argue that subject matter jurisdiction is



established by reason of alleged violations of section 401 of the Water Act, 33 U.S.C. 1341, and the process of law. Section 401(a)(1) provides in relevant part:

"Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate ... that any such discharge will comply with the applicable provisions of sections 301, 302, 306, and 307 of this Act. In the case of any such activity for which there is not an applicable effluent limitation or other limitation under sections 301(b) and 302, and there is not an applicable standard under sections 306 and 307, the State shall so certify ...."

An evident purpose of section 401 is to afford concerned states an opportunity for substantial participation in the issuance of NPDES permits.

In the present case, plaintiffs allege that certain of the state defendants failed to hear new expert testimony and failed to make a "complete" certification. However, section 401 provides no basis for review by this Court of state certification. State certification is merely a step in the administrative process. Section 402(a)(1) of the Water Act, 33 U.S.C. 1342(a)(1), requires that before an NPDES permit may be issued, the LPA Administrator must also determine that a discharge "will meet either all applicable requirements under sections 301, 302, 306, 307, 308 and 403 of this Act, or prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this Act." Once the administrative process has been concluded and

the NPDES permit has been issued, the Water provides for judicial review in the Court of Appeals. Review by this Court of a state certification under section 401 of the Water Act would not only result in interruption of the administrative process, see Anaconda Co. v. Ruckelshaus, supra; Nader v. Volpe, supra, but would also be an unwarranted intrusion upon the functions of the Court of Appeals and the state courts. Section 401 therefore provides no basis for jurisdiction over plaintiffs' claims against the state defendants. Moreover, as pointed out at pp. 9-10 supra, this Court has no jurisdiction under the citizen suit provisions of section 505 of the Water Act to entertain plaintiffs' claims against the state defendants.

Contending that they have been deprived of property without due process of law and without just compensation, plaintiffs assert that they may maintain suit against the state defendants under 42 U.S.C. §1983 and 28 U.S.C. §1343. Jurisdiction under 28 U.S.C. §1343 may exist where a complaint alleges deprivation of property rights through state action. Simmons v. Wetherell, 472 F.2d 509 (2d Cir.), cert. denied, 412 U.S. 940 (1973). However, one clear fact which is disclosed in the amended complaint is that the state defendants are not involved in any alleged taking of plaintiffs' property. None of the state permits here challenged by plaintiffs could be said to authorize or encourage the private defendants to cause damage to plaintiffs' property, see Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972); Watson v. Kenlick Coal Co., 498 F.2d 1183 (6th Cir. 1974), and their



issuance does not amount to a taking of property. Certification by the state under section 401 of the Water Act is directed toward maintenance and restoration of water quality and protection of fish and wildlife. The purpose of the stream permit issued pursuant to Article 15, Title 5 of the New York Environmental Conservation Law is to protect the "health, safety and welfare of the people of the state" and "the natural resources of the state, including soil, forests, water, fish and aquatic resources therein." See N.Y. Environmental Conservation Law, §§ 15-0501(3)(b), 15-0503(3)(b), 15-0505(3), (McKinney's 1973). The highway work permit manifests the state's interest in the maintenance and safety of its highways. N.Y. Highway Law §52 (McKinney's Supp. 1974-1975). See People v. Delaware & Hudson Co., 183 App. Div. 149, 170 N.Y.S. 240 (3d Dept. 1918), aff'd, 223 N.Y. 279, 127 N.E. 244 (1920). Nor have plaintiffs alleged such discriminatory action on the part of the state defendants as would raise a substantial question under the Equal Protection Clause of the Fourteenth Amendment. See Williamson v. Lee Optical Co., 348 U.S. 483 (1955). Any injury being caused to plaintiffs results from the activities of the private defendants for which plaintiffs have remedies under state law. See e.g. N.Y. Environmental Conservation Law, §15-0701 (McKinney's 1973); Ferguson v. Village of Hamburg, 372 N.Y. 234, 5 N.E.2d 801 (1936). The motion of the state defendants to dismiss the amended complaint as against them is granted.

TOWN DEFENDANTS' MOTION TO DISMISS AND FOR SUMMARY JUDGMENT

Three "claims for relief" are pleaded against the town defendants. Plaintiffs' "eleventh claim for relief" (pars. 103-111) alleges that various of the town defendants "wilfully and knowingly" failed to protect plaintiffs from damage caused by the private defendants by not enforcing town ordinances, including the provisions of the zoning ordinance relating to the designed residential development ("DRD") permit issued in connection with the development of Heritage Hills. Specifically, plaintiffs charge that various of the town defendants failed to "[p]rotect wetlands, streams, water bodies, water supplies and prevent erosion as required under §72.02(B) of the DRD provisions;" failed to "[r]equire location of the [Heritage Hills] sewage treatment plant so as to permit easy linkage to the proposed trunk sewer line, as required under §72.02(a)(6)(c) of the DRD;" failed to "[r]equire compliance with all the DRD permit conditions, such as the condition that a 100 foot buffer-zone be maintained between the sewage effluent pipe and adjacent property;" "failed to take effective action in response to the erosion, siltation and flooding of the Sun Property, as required under §72.02(f)(3)(j) of the DRD provisions, despite many and repeated complaints by Sun and Kipp;" and "failed to enforce the Ordinance of February 11, 1941, numbered 5 in the Town's Ordinance Book, prohibiting those constructing [Heritage Hills] from depositing dirt on any street or highway in Somers, to the end that dirt was deposited on the highway and ran off into Brown Brook causing severe siltation and damage to plaintiffs'



interests." Plaintiffs' "twelfth claim for relief" (pars. 112-119) asserts that various town defendants failed to comply with applicable state and town law in connection with the laying of a sewage treatment effluent pipe by Sewage Works Corporation and the issuance of a road opening permit. In their "thirteenth claim for relief" (pars. 120-122) plaintiffs allege that the DRD permit and road opening permit and other related acts and omissions of the town defendants resulted in a taking of property without compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution. The town defendants move to dismiss the complaint and for summary judgment.

As with the state defendants, plaintiffs' allegations against the town defendants are insufficient to establish federal jurisdiction. The damage allegedly being wrought upon the plaintiffs stems from the activities of the private defendants. Such injuries to plaintiffs are not authorized by the permits issued by the town defendants; and although the private defendants may in a sense be encouraged in their alleged transgressions by lackluster enforcement of the law by the town defendants, the actions of the town defendants as alleged in the complaint are not such as would raise a substantial question of deprivation or confiscation of property under the Fifth and Fourteenth Amendments. Cf. Cabrera v. Municipality of Bayamon, 370 F.Supp. 859 (D.P.R. 1974); Miles v. District of Columbia, 354 F.Supp. 577 (D.D.C. 1973). Contra Beaver v. Borough of Johnsonburg, 375 F.Supp. 326 (W.D.Pa. 1974). Plaintiffs allegations against the town defendants also fail to

raise a substantial question under the Equal Protection Clause of the Fourteenth Amendment. See Williamson v. Lee Optical Co., supra. Plaintiffs' remedies for the acts and omissions of the town defendants alleged in the amended complaint lie in the state court. Accordingly, the motion of the town defendants to dismiss the amended complaint as against them is granted.

PRIVATE DEFENDANTS' MOTION TO DISMISS AND FOR SUMMARY JUDGMENT

Five separate "claims for relief" are pleaded against the private defendants. Plaintiffs' "third claim for relief" (pars. 57-63) charges that without obtaining a permit pursuant to section 404 of the Water Act, 33 U.S.C. §1344, the private defendants "have diverted a stream [Brown Brook] and rechannelled it and constructed and participated in constructing a sewage treatment plant for [Heritage Hills] on the bed of that stream;" "have dredged and discharged material into Brown Brook;" and "are now discharging earth, silt and other materials into Brown Brook." In their fourteenth, fifteenth, sixteenth, and seventeenth "claims for relief" (pars. 123-146) plaintiffs allege respectively prima facie tort, violation of riparian rights, nuisance, and trespass. The private defendants move to dismiss the complaint and for summary judgment in their favor.

The only apparent grounds for federal jurisdiction over the claims pleaded against the private defendants are sections 301 and 404 of the Water Act, 33 U.S.C. §§ 1311, 1344. Although plaintiffs make reference in their "fourteenth claim for relief" to



the private defendants "acting under color of law," the allegations of the complaint are insufficient to raise a substantial question under 42 U.S.C. §1983 or the Fifth and Fourteenth Amendments.

Section 391(a) provides in relevant part:

"Except as in compliance with this section and sections ... 404 of this Act, the discharge of any pollutant by any person shall be unlawful."

Pursuant to section 404,

"[t]he Secretary of the Army, acting through the Chief of Engineers, may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites."

The term "discharge of a pollutant"

is defined in section 502(12), 33 U.S.C. §1362(12), as "any addition of any pollutant to navigable waters from any point source." Section 502(6), 33 U.S.C. §1362(6), defines "pollutant" as "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." "Point source" is defined in section 502(14), 33 U.S.C. §1362(14), as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged."

appears to be the contention of the private defendants that sections 301 and 404 are inapplicable to any alleged dredge and fill activities because Crown Brook (which is described in the complaint as a stream "which empties into the Muscoot Reservoir on the Croton River, a tributary of the Hudson River") does not qualify as "navigable waters" within the meaning of these provisions.

The term "navigable waters" as used in the Water Act is defined in section 502(7), 33 U.S.C. §1362(7), as "the waters of the United States, including the territorial seas." In the Conference Report on the Water Act, the conferees indicated their intention that the term "navigable waters" be given "the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes." S. Rep. No. 92-1236, 92d Cong., 2d Sess., 2 U.S. Cong. & Admin. News 3776, 3822 (1972). That the phrase "waters of the United States" is to be construed in its geographical sense is underscored by the remarks of Congressman John Dingell made during House debate on the Conference Report. Congressman Dingell stated:

"[T]he conference bill defines the term 'navigable waters' broadly for water quality purposes. ... It means all 'the waters of the United States' in a geographical sense. It does not mean 'navigable waters of the United States' in the technical sense as we sometimes see in some laws

....

"[T]his new definition clearly encompasses all water bodies, including main streams and their tributaries, for water quality purposes. No longer are the old, narrow definitions



of navigability, as determined by the Corps of Engineers, going to govern matters covered by this bill. ..."

Environmental Policy Division of the Congressional Research Service, 93d Cong., 1st Sess., A Legislative History of the Water Pollution Control Act Amendments of 1972 250 (Comm. Print 1973).

Although the Corps of Engineers apparently continues to construe the term "navigable waters" restrictively, see 33 C.F.R. §209.260 (1974), the courts have upheld application of the provisions of the Water Act to waterways which are not navigable in the traditional sense. See United States v. Ashland Oil and Transportation Co., 504 F.2d 1317 (6th Cir. 1974), affirming 364 F.Supp. 349 (W.D.Ky. 1973); United States v. Holland, 373 F.Supp. 665 (M.D.Fla. 1974). In United States v. Ashland Oil and Transportation Co., supra, the Court of Appeals for the Sixth Circuit affirmed the conviction of a defendant under section 311(b) (5) of the Water Act, 33 U.S.C. §1321(b) (5), for failing immediately to notify an appropriate federal agency after gaining knowledge that it had discharged oil into a non-navigable stream. The oil had discharged directly into the waters of a small tributary to Little Cypress Creek, which "is a tributary to Cypress Creek, which is a tributary to Pond River, which is a tributary to Green River." Only Green River was actually navigable. United States v. Ashland Oil and Transportation Co., 504 F.2d, at 1320. The Court in United States v. Holland, supra, held that defendants had violated section 301(a) of the Water Act by filling and otherwise polluting man-made mosquito canals and mangrove wetlands above the mean high waterline. Indeed, the strength of the private defendants' argument that Brown

Brook does not fall within the reach of sections 301 and 404 of the Water Act is somewhat undercut by the fact that they did apply for an NPDES permit pursuant to section 402 of the Water Act to allow the discharge of sewage treatment effluent into Brown Brook. Nor does application of sections 301 and 404 to the dredge and fill activities alleged in the complaint exceed Congressional power under the Commerce Clause of the federal Constitution. See Perex v. United States, 402 U.S. 146 (1971); United States v. Ashland Oil and Transportation Co., *supra*; United States v. Holland, *supra*.

The private defendants further contend that their obtaining of an NPDES permit excuses any need for a permit pursuant to section 404. However, although the EPA Administrator may issue NPDES permits for the discharge of certain pollutants, Congress has directed that the Secretary of the Army, acting through the Chief of Engineers, rather than the Administrator, issue permits for the discharge of "dredged or fill material." Therefore, insofar as plaintiffs' "third claim for relief" alleges that the private defendants have discharged, are discharging, and propose to discharge into Brown Brook dredged or fill material, without having obtained a permit from the Secretary of the Army pursuant to section 404, a claim for relief is stated over which this Court has subject matter jurisdiction. See 33 U.S.C. §1365; Save Our Sound Fisheries Ass'n v. Callaway, 4 ELR 20437 (D.R.I. 1974); Scenic Hudson Preservation Conference v. Callaway, 370 F.Supp. 162 (S.D.N.Y. 1973), *aff'd*, 499 F.2d 127 (1974). Since the present record is insufficient to sustain a defense of laches, *cf. Clark*



v. Volpe, 342 F.Supp. 1324 (E.D.La. 1972), aff'd, 461 F.2d 1266 (5th Cir. 1972), the motion of the private defendants to dismiss the amended complaint and for summary judgment is denied as to plaintiffs' "third claim for relief."

Plaintiffs seek to have the Court exercise pendent jurisdiction over the state law claims alleged in their fourteenth, fifteenth, sixteenth, and seventeenth "claims for relief." In order for pendent jurisdiction to exist, "[t]he state and federal claims must derive from a common nucleus of operative fact." United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966). This Court's subject matter jurisdiction is limited strictly to questions arising from the discharge into Brown Brook of pollutants which qualify as "dredged or fill material" within the meaning of section 404 of the Water Act. However, plaintiffs' state law claims as alleged involve not only discharge of "dredged or fill material," but also discharge of sewage treatment effluent and other activities. Since the state claims present substantial issues of fact additional to those presented by the discharge of "dredged or fill material," as alleged in plaintiffs' "third claim for relief," the state and federal claims cannot be said to derive from a common nucleus of operative fact, and this Court is without pendent jurisdiction. However, even if pendent jurisdiction did exist, the Court would, under the circumstances, decline to exercise it. The motion of the private defendants to dismiss the complaint is therefore granted as to plaintiffs' fourteenth, fifteenth, sixteenth and seventeenth "claims for relief."

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In reaching the foregoing disposition of the private defendants' motion to dismiss and for summary judgment, the Court does not understand plaintiffs to be presently alleging that the quality of any sewage treatment effluent discharge from Heritage Hills into Brown Brook violates the conditions of the NPDES permit issued to "H&H Land Corporation - Heritage Hills of Westchester."

To summarize, the motion of the federal defendants to dismiss the amended complaint as against them is granted, except as to plaintiffs' "second claim for relief," upon which summary judgment will be entered in favor of the federal defendants. The motions of the state and town defendants to dismiss the amended complaint as against them are granted. The motion of the private defendants to dismiss the amended complaint as against them is granted, except as to plaintiffs' "third claim for relief," upon which the private defendants' motion to dismiss and for summary judgment is denied.

Settle order on notice.

Dated: New York, N.Y.  
May 9, 1975

WILEY R. BONSAI  
U. S. D. J.



**Court of Appeals  
For the Second Circuit**

The Reporter Co., Inc., 11 Park Place, New York, N. Y. 10007

**Sun Enterprises, Ltd., Southern New York Fish and Game Association, Inc.,  
Lyman E. Kipp, Richard E. Homan, No Bottom Marsh and Brown Brook  
Plaintiffs-Appellants**

**against**

**Russell E. Train et al.  
(Federal Defendants)**

**Defendants-Appellees, and**

**Heritage Hills of Westchester, et al.  
(Private Defendants)**

**Intervenors**

State of New York, County of New York, ss.:

**Raymond J. Braddick,**

**agent for Marshall Bratter Greene Allison & Tucker Esqs.** being duly sworn, deposes and says that he is the attorney

for the above named **Appellants-Petitioners**

herein. That he is over

21 years of age, is not a party to the action and resides at **8 Mill Lane Levittown, New York**

That on the **20th.** day of **October**, 1975, he served the within

**Brief for Appellants-Petitioners**

upon the attorneys for the parties and at the addresses as specified below

1. **Blasi & Zimmerman Esqs.  
360 S. Broadway  
Tarrytown, New York 10591**

by depositing **3 true copies**

to each of the same securely enclosed in a post-paid wrapper in the Post Office regularly maintained by the United States Government at

90 Church Street, New York, New York

directed to the said attorneys for the parties as listed above at the addresses aforementioned, that being the addresses within the state designated by them for that purpose, or the places where they then kept offices between which places there then was and now is a regular communication by mail.

Sworn to before me, this **20th.**

day of **October**, 19**75**

*Roland W. Johnson*  
**ROLAND W. JOHNSON,**

Notary Public, State of New York  
No. 4509705

Qualified in Delaware County  
Commission Expires March 30, 1977

*Raymond J. Braddick*





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3 COPIES RECEIVED  
*Paul J. Curran* (ms)  
UNITED STATES ATTORNEY  
10-20-75

